

ADVISORY | Election and Political Law

January 7, 2014

FORMING AND OPERATING SUPER PACS: A PRACTICAL GUIDE FOR POLITICAL CONSULTANTS

With the 2014 election year upon us, preparations are well underway for races at the federal, state, and local levels. With two election cycles already under their belt, Super PACs promise to be more prevalent and influential than ever. They are being set up not just in federal races, but in races up and down the ballot. We haven't yet seen a Super PAC established in a race for dog catcher, but that can't be too far off.

Despite Super PACs' significance in today's campaigns, political consultants seeking to set them up have little real-world guidance to draw upon. The high-level primer below aims to change that by providing political consultants with a practical resource for creating and running a Super PAC in a legally compliant manner.

After explaining what a Super PAC is and addressing the basic rules that apply to Super PACs, we (i) set forth a checklist of steps for creating a Super PAC, (ii) explain the options available to Super PACs for federal reporting, (iii) outline some of the safeguards Super PACs should implement to avoid illegally coordinating with candidates, (iv) provide "do's" and "don'ts" for candidate involvement in fundraising, and (v) discuss the rules governing operation of Super PACs alongside Section 501(c)(4) social welfare organizations.

SUPER PACS 101

Several court decisions in 2010, including the Supreme Court's *Citizens United* decision and the D.C. Circuit's *SpeechNow* decision, made clear that the First Amendment protects the right of individuals, corporations, and unions to spend their resources on independent political speech that expressly 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 PACs" as they are frequently called.¹

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." 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,

¹ Most state agencies and courts that have considered the question have similarly concluded that the right to fund and operate independent expenditure-only PACs applies equally in state and local elections. Although this primer focuses on federal Super PACs, similar rules typically apply for political committees that make independent expenditures in state or local elections. You should consult counsel for advice as to how Super PACs are regulated under specific state and local laws.

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.

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, social media, email, or phone calls from a phone bank or prerecorded messages (“robo-calls”). Super PACs are also increasingly engaging in other forms of political activism, such as ground campaigns and opposition research.

FORMING A SUPER PAC

While the FEC’s campaign finance regulations are often complex, creating a Super PAC is surprisingly simple. To form a Super PAC, political consultants must take the following steps:

- 1. Choose a name.** Often the most challenging step in creating a Super PAC is coming up with a name. Because the name will be identified in advertisement disclaimers, Super PACs generally attempt to choose a name that resonates with voters and that emphasizes the campaign theme of the candidate(s) supported. At the same time, Super PACs should be careful not to choose a name that could prompt a copyright or trademark challenge from a similarly named organization. FEC regulations also prohibit “unauthorized committees” (including Super PACs) from including the name of any candidate in the PAC’s name.
- 2. Set up a bank account.** Once the name is chosen, the Super PAC needs a bank account. Before opening the bank account, new Super PACs should obtain an Employer Identification Number (“EIN”) from the Internal Revenue Service. This can be accomplished online here. The Super PAC should not share an EIN with any other entity or person.
- 3. Identify a treasurer.** Every Super PAC must have a treasurer who oversees receipts and disbursements, and who is personally responsible for ensuring that the PAC timely files the necessary reports and that those reports are accurate. Super PACs sometimes retain experienced employees of specialty political accounting firms as treasurers and custodians of records. They may also designate an assistant treasurer to act in the treasurers’ absence.
- 4. File an FEC Form 1.** Within 10 days of receiving contributions or making expenditures in connection with a federal election in excess of \$1,000, Super PACs must file a four-page FEC registration statement. Instructions are available here.
- 5. Send a letter to the FEC.** In addition to the registration statement, the Super PAC must also submit a two-sentence letter to the FEC that states: “This committee intends to make independent expenditures, and consistent with the U.S. Court of Appeals for the District of Columbia Circuit decision in *SpeechNow v. FEC*, it therefore intends to raise funds in unlimited amounts. This committee will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees.” A template letter is available here.

SUPER PAC REPORTING

Like other federal PACs, the finances of Super PACs are transparent, though their organizational structures need not be. 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.²

² 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 traditional PACs apply to Super PACs 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.

Super PACs can choose their reporting frequency: they can file reports according to a “monthly” or “quarterly” schedule. Super PACs may change their schedule from monthly to quarterly (or vice versa) only once each year. For 2014 activity, the reporting schedules are as follows:

Monthly Filers		Quarterly Filers	
<i>Covering Period</i>	<i>Due</i>	<i>Covering Period</i>	<i>Due</i>
January 1-31	February 20	January 1-March 31	April 15
February 1-28	March 20	April 1-June 30	July 15
March 1-31	April 20	July 1-September 30	October 15
April 1-30	May 20	Pre-General (Oct. 1-15)	October 23
May 1-31	June 20	Post-General (Oct.16-Nov. 24)	December 4
June 1-30	July 20	Year-End 2014 (Nov. 25-Dec. 31)	January 31, 2015
July 1-31	August 20	Pre-Primary (Close of books of prior report to 20th day before primary)	12th day before each primary in which PAC participated
August 1-31	September 20		
September 1-30	October 20		
Pre-General (Oct. 1-15)	October 23		
Post-General (Oct. 16-Nov. 24)	December 4		
Year-End 2014 (Nov. 25-Dec. 31)	January 31, 2015		

Although “quarterly” filers typically file fewer reports than monthly filers, their reporting schedule is more complicated because they must file “pre-primary reports” 12-days before every primary in which they are active. Super PACs active in many state primary elections typically chose to file on a “monthly” basis because the reporting schedule is more predictable. A Super PAC active in just one race, however, may choose a “quarterly” schedule because it requires fewer reports.

Regardless of the reporting frequency chosen, Super PACs typically must also file 24 or 48-hour notices disclosing independent expenditures above certain amounts. The content and timely filing of 24 and 48 hour reports have proven to be the most costly enforcement problem for many Super PACs. It is important for the Super PAC to have experienced staff in place to track and report independent expenditures, and for that individual to be closely integrated into the spending decisions of the organization.

AVOIDING COORDINATION

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, campaign, or 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.

To protect against unlawful coordination with candidates and their agents – the most important compliance risk Super PACs face – Super PACs should establish policies and structures to ensure their independence from the candidates they support. These rules should 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. Among other things, coordination policies should address:

- **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 (or vice versa). 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. Super PACs retaining vendors that provide services to candidates should consider whether those vendors have, or should have, firewall policies in place, and ensure that any such policies are adequate.
- **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.

CANDIDATE INVOLVEMENT IN FUNDRAISING

FEC advisory opinions have concluded that a federal candidate or officeholder may attend, speak at, or be a featured guest at a Super PAC fundraising event and that they may speak favorably of the Super PAC at these events. However, according to those advisory opinions, the federal candidate or officeholder 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). The FEC has yet to enact regulations specifically addressing the rules governing candidate and officeholder solicitations for Super 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. Consequently, both the Super PAC and the candidate need to carefully limit their communications leading up to, and at, the event.

OPERATING ALONGSIDE 501(c)(4) ORGANIZATIONS

It is common for Super PACs to be associated with organizations operating under other sections 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 on publicly-filed reports. When working with any group, however, a Super PAC needs to ensure that its partners (including 501(c)(4) organizations) do not pass on non-public information they gained from a campaign or political party the Super PAC is supporting.

Any sharing of staff between a (c)(4) and a related Super PAC, as well as any direct contributions from the (c)(4) to the Super PAC, will present unique issues, including reporting issues, that should be reviewed with counsel.

LEGAL AND ACCOUNTING SUPPORT

While the reporting and compliance rules discussed above may seem burdensome, Super PACs need not go it alone. Specialty political accounting firms can track the committee's books and records, file the required reports, and ensure that reports are reconciled with the PAC's bank statements. Legal counsel can also provide ongoing compliance support, including by drafting coordination and firewalls policies, vetting advertisements for compliance with disclaimer rules and for libel risk, and structuring communications and events to reduce the risk of unlawful coordination.

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, lobbying firms, and high net worth individuals 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](#).

If you have any questions concerning the material discussed in this advisory, please contact the following members of our election and political law practice group:

Robert Kelner	+1.202.662.5503	rkelner@cov.com
Bob Lenhard	+1.202.662.5940	rlnhard@cov.com
Anthony Herman	+1.202.662.5280	aherman@cov.com
Zack Parks	+1.202.662.5208	zparks@cov.com
Derek Lawlor	+1.202.662.5091	dlawlor@cov.com
Alex Wong	+1.202.662.5748	awong@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts. © 2014 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.