FEC Enforcement Pending FEC Cases From 2004 Campaign Could Clarify Legal Status of 527 Groups

The Federal Election Commission has 85 “pending investigations” involving matters arising from the 2004 campaign season, FEC General Counsel Lawrence Norden said Sept. 16.

Norden provided no details on the status of the investigations or parties involved because of FEC rules requiring that open enforcement matters be kept secret. Others indicated, however, that a number of the current probes involve the activities of independent political organizations—often known as Section 527 groups—which rose to prominence in last year’s presidential campaign.

Attorney Kenneth Gross, who advises campaign donors, said that many donors recently have received government subpoenas asking for information about their involvement with Schedule 527 groups. Gross and other private attorneys suggested the donors may not be the target of current probes but are being contacted as witnesses in these investigations.

Norden, the FEC counsel, and Gross, a partner in the law firm Skadden, Arps, Slate, Meagher and Flom, spoke to an audience of corporate attorneys and others at an internal Washington conference on corporate political activities sponsored by the Practising Law Institute (PLI).

"Donors Getting Subpoenas.

"We’re finding that donors are getting subpoenas even if they have no liability” for campaign finance violations, Gross said. While none of the pending cases has reached a conclusion that the activities of Section 527 groups were divisive, Gross said that the existence of the current investigations has chilled activity in this area during the current election cycle, at least for the time being.

Norden said, though, that it was too early to say whether the role of such organizations would be diminished in next year’s congressional elections and the 2008 presidential race.

Independent political groups rose to prominence in 2004, collecting hundreds of millions of dollars, mainly in large contributions from a few donors. Groups such as America Coming Together and the Media Fund helped push Democratic presidential candidate John Kerry, while GOP-leaning groups like Progress for America and Swift Boat Veterans for Truth supported President Bush.

Speaking to the conference, Norden said the FEC so far has received 367 enforcement matters, including complaints filed with the commission arising from the 2004 campaign. He said more than half of these—188—have already been dismissed, while 85 cases have been activated by the commission.

Another 54 cases remain in limbo, neither dismissed nor actively pursued. Norden said. These could include cases that are not yet reviewed or cases that a majority of FEC commissioners could not come to a conclusive decision to dismiss.

Cases to Develop Law?

The FEC considered but ultimately did not adopt a stringent regulation that could have curbed the activities of Section 527 groups in 2004. Various parties involved in the campaign contend, nonetheless, that the activities of some or all of these groups were illegal and not in compliance with the FEC, the bulk of which still are believed to be open.

Norden said, that despite the FEC’s inability to clarify the status of the 527 groups through a regulation, “the law can be developed in other ways.” He suggested that the results of pending cases, once concluded and revealed, could establish the legal status of independent groups.
Addressing the potential liability of donors to such groups, Thomas noted that the FEC "very, very rarely" has acted in the past against supporters of groups claiming exemption from FEC rules. On the other hand, Toner said that he would advise people to be "very cautious" because "there is a lot of activity" due to ongoing activity in this area. Toner noted, for example, that lawsuits remain pending in federal court challenging the FEC's actions on regulating Section 527 groups.

Toner added that recent years have seen more changes in campaign finance law than have been witnessed in a long time and suggested that the law will continue to develop quickly over the next several months.

**DOJ Has Active Probes**

In addition to the discussion of FEC activity, officials from the Justice Department told the PLI conference that DOJ has become more active in this area in the wake of BCRA's passage. Craig Dougherty, chief of DOJ's Election Crimes Branch, noted that BCRA strengthened criminal enforcement provisions of campaign finance law, and the department has taken this as a signal to crack down in this area.

The FEC has civil enforcement authority for all violations of federal campaign finance law and brings cases that can result in fines. DOJ has criminal enforcement authority for "knowing and willful" violations and now has the authority to bring cases that can result in serious jail time for campaign finance violators, Donsanto said.

He said DOJ currently has 50 "active investigations" of possible criminal violations of campaign finance laws. He said the usual focus of criminal probes is on violations of "heartland" provisions of the law, such as the ban on corporate campaign contributions, contributing through "fronts" to avoid campaign finance limits, and obstructing investigations of such violations. Donsanto added that the department is set to publish soon a revised manual for prosecuting campaign finance crimes that will take "a much more aggressive tone" than previous guidelines about prosecuting such crimes.

Donsanto's superior at DOJ, Neil Hamburger, head of the Public Integrity Section, said the department views public corruption cases, including campaign finance cases, as a very high priority. "We're training a small army of federal prosecutors" to pursue such cases, he said.

At the same time, Hamburger said DOJ's prosecutorial decisions would be fair and objective and would not "target people based on political affiliation."

Private attorneys at the PLI conference suggested DOJ may be becoming too aggressive and may be focusing unfairly on donors rather than candidates seeking for contributions. But, Donsanto responded that "when we have a case, we take it as high as we can," including pursuing a candidate in matters where there is knowledge and intent to violate the law.

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