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NEWSLETTER

Minnesota Campaign Finance Board Adopts Stricter Position on Super PAC Coordination

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The rise of Super PACs has been one of the biggest developments to emerge from the Supreme Court's 2010 decision in *Citizens United v. FEC*. Unlike ordinary PACs, which make direct contributions to candidates and which may only accept amount-limited contributions from individuals, Super PACs may raise unlimited amounts from individuals, corporations, and labor unions. Notwithstanding Super PACs' freedom from some of the traditional campaign finance constraints, they are still generally prohibited from coordinating with the candidates they support. This important condition has posed quandaries for regulators over what constitutes "coordination."

On February 11, 2014, after more than two months of difficult deliberations, the Minnesota Campaign Finance and Public Disclosure Board concluded that candidates for state office who solicit contributions to Super PACs, or who speak at Super PAC fundraising events, will jeopardize the independence of any expenditures those Super PACs make on behalf of those candidates (AO 437). Because Minnesota prohibits corporate and unlimited contributions to candidates, expenditures by Super PACs that are not made independently of candidates are considered prohibited and excessive in-kind contributions.

The Minnesota agency's decision is notable for its divergence from the Federal Election Commission's decision on the same question. In 2011, the FEC stated that federal candidates and officeholders, as well as officers of national party committees, may attend, speak, and be featured guests at Super PAC fundraisers where unlimited contributions are solicited. The FEC also advised that these individuals may explicitly solicit contributions to Super PACs, but only up to the $5,000 limit that such individuals are permitted to solicit by

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statute to traditional PACs (AO 2011-12).

The two agencies' different approaches may be attributed to the FEC's regulations on coordinated communications, which provide very specific parameters on what activities will result in coordination so as not to overly restrict the interactions federal candidates and officeholders may have with advocacy groups that are not engaged in election-related activities. By contrast, the Minnesota Board looked past the advisory-opinion requester's representations that the candidate would not coordinate with the Super PAC as to the PAC's strategy for its expenditures—factors that are important under the FEC's analysis. Instead, the Minnesota Board reasoned that an expenditure's independence must be determined according to "all of the activities needed to make the communication," which includes fundraising. The Minnesota Board left open the possibility that candidates could participate at Super PAC fundraisers and encourage support for Super PACs, so long as the Super PACs are not supporting those same candidates.

As the campaigns for this year's elections pick up steam, the federal and state coordination rules will take on increased importance not only for candidates and Super PACs, but also for corporations, trade associations, and nonprofit groups that may have only occasional dealings with candidates. The Wiley Rein election law practice routinely counsels all types of clients on how they may interact with each other in the political process without running afoul of the campaign finance laws.