

Campaign Manager Pleads Guilty to Illegal Coordination of Super PAC Spending; How Significant is That?

March 2015

Republican political consultant Tyler Harber pleaded guilty in Federal District Court on February 12, 2015, to one count of illegal coordination of spending under campaign finance law and one count of false statements to the FBI. Sentencing is scheduled for June 5, 2015.

The U.S. Department of Justice (DOJ) prosecution stemmed from the 2012 U.S. House of Representatives race in Virginia's Eleventh Congressional District, in which Chris Perkins ran unsuccessfully against incumbent Congressman Gerald Connolly. According to the DOJ's plea agreement with Mr. Harber, who was the campaign manager for Mr. Perkins, the case began when Mr. Harber and his wife were raising money for the National Republican Victory Fund and fraudulently told contributors that 98% of funds raised for the super PAC would be used to sponsor independent expenditures to assist federal candidates. In fact, according to the plea documents, 23% of the funds went to Harber, his wife, and his mother in the form of "commissions" from the super PAC's vendors and payments for services that were never performed. According to a *Washington Post* article, the DOJ began investigating when a local Republican party official suspected the super PAC was a scam and alerted federal prosecutors.

The subsequent DOJ investigation revealed that Mr. Harber "participated in [the] creation and operation" of the super PAC at the same time he served as campaign manager for Mr. Perkins, and that Mr. Harber "participat[ed] in the purchase of specific advertising" by the super PAC which "politically opposed" Connolly. The super PAC spent \$325,000 in total on supposedly independent expenditures opposing Connolly. Money spent in coordination with a candidate or his campaign constitutes a "contribution" under federal law and thereby was subject to a limit of \$2,500 during the 2012 election cycle.

The case marks the first time that anyone has been prosecuted for criminal coordinated campaign spending. Under the federal campaign finance laws the Federal Election Commission (FEC) has exclusive jurisdiction over civil violations. The DOJ has exclusive jurisdiction over criminal violations. Campaign finance violations become criminal misdemeanors when they are knowing and willful and involve amounts of more than \$2,000; knowing and willful violations involving amounts of more than \$25,000 are felonies.

In contrast to the DOJ's prosecution of Mr. Harber, the *Post* article noted that the FEC has not found violations in any coordination complaints filed with the agency since the Supreme Court of the United States' *Citizens United* decision in 2010, "in part because the FEC's narrowly drawn coordination regulation . . . contains so many exceptions that there is still ample room for candidates to work in concert with their big-money allies." However, it may be drawing too broad of an inference from Mr. Harber's prosecution to suggest that the DOJ actually has taken a broader approach to the law of coordination than has the FEC.

Under the FEC's rules, an ad is deemed "coordinated" if it meets a "payment prong," a "content prong," and a "conduct prong." The payment prong simply asks whether someone other than a candidate or a party committee has paid for the ad. The content prong asks whether the ad contains certain content, such as, among other things, express advocacy or a reference to a federal candidate within certain time windows. Lastly, the conduct prong asks whether a candidate, a party committee, or an agent thereof has engaged in certain coordinating conduct with the person or entity sponsoring the ad, including but not limited to making a "request or suggestion," having "material involvement," or engaging in "substantial discussions" with respect to the ad.

Complaints alleging coordination have been filed with the FEC and been dismissed for insufficient evidence to warrant an investigation. Apparently no complaint was ever filed against Mr. Harber with the FEC. However, in our view, if a complaint had been filed with any of the evidence disclosed in the plea, the FEC most surely would have investigated and enforced its regulations. Although the DOJ plea documents use the term "politically opposed" to describe the content of the ads at issue—a term which does not appear in the FEC's coordination rules—the super PAC reported to the FEC that the ads were express advocacy independent expenditures. Thus the content prong of the FEC rules is met. With respect to the conduct prong, Mr. Harber was unquestionably an agent (indeed, a key official) of the Perkins campaign at the same time he was materially involved in making decisions on behalf of the super PAC in terms of the content, timing, and distribution of the ads opposing Mr. Perkins's opponent. These facts satisfy the conduct prong.

The DOJ's prosecution of Mr. Harber does not, in and of itself, appear to signal that the department has taken a broader approach to the substantive law of coordination. Nonetheless the case serves as a cautionary reminder that, given the right facts, campaigns, independent groups, and their individual employees may be held liable for violations, and may even be subject to criminal penalties (including up to five years of jail time for individuals). Similarly, complaints with the FEC that present substantiated allegations of coordination also are likely to trigger civil investigation. Any perceived lack of action by the FEC in this area is more a result of incredible complaints than an unwillingness to enforce.

Wiley Rein's Election Law practice group regularly counsels and represents clients in matters involving federal and state campaign finance coordination laws.