

FEC Deadlocks on Foreign National Contributions

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The question of whether foreign nationals may make political contributions in connection with U.S. elections is an issue that comes up with some frequency, but there is often not a lot of understanding about what is and is not permitted. A recent 3-3 deadlock by the commissioners at the Federal Election Commission (FEC) is a reminder of the obscurity regarding this issue, and the potentially serious consequences of violating the law.

As a general matter, the federal campaign finance laws address activities in connection with elections for federal office, while state campaign finance laws address activities in connection with state (and in many cases local) elections. We have seen many instances in which individuals and entities involved in state and local elections have unwittingly run afoul of the law with respect to foreign national contributions because they failed to consult the federal law and only checked the state laws, which frequently are silent on this issue. Under federal law, foreign nationals are specifically prohibited from making contributions in connection with state and local elections, in addition to federal elections.

The FEC's recent split decision on this issue arose out of an enforcement matter involving contributions made by two foreign corporations to a committee that opposed a Los Angeles County ballot measure in 2012. Specifically, the FEC commissioners differed on whether the "elections" covered by the foreign national contribution prohibition includes only elections for political office, or whether it also applies to ballot measure elections.

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In written statements, two of the three Democratic commissioners who voted to find that the contributions violated the law cited changes made to the statutory language by the 2002 Bipartisan Campaign Reform Act (BCRA). Whereas the statute previously had prohibited foreign national contributions in connection with "an election to any political office," the 2002 legislation amended the statute to cover any "Federal, State, or local election." The Democratic commissioners viewed this language change as broadening the scope of the prohibition to apply to ballot measure elections. The Democratic commissioners also cited the general policy of not permitting foreigners to participate in processes of "democratic self-government" where they are not part of the political community.

The three Republican commissioners, who voted to dismiss the matter, cited long-standing agency interpretations that the federal statute generally does not cover ballot measure activities. They also pointed to a guidance document specifically addressing foreign nationals that the agency issued after the passage of BCRA continuing to suggest that "foreign nationals could make disbursements solely to influence ballot issues."

Although the latest FEC enforcement matter may not have definitively settled the question of whether foreign nationals may make contributions in connection with state and local ballot measures, it serves as a helpful reminder that there are a whole host of other complex issues that candidates, Political Action Committees (PACs), and corporations should keep in mind when dealing with foreign nationals. As a preliminary matter, a "foreign national" is not necessarily synonymous with someone who is not a citizen. A permanent resident who has a "green card" is not treated as a "foreign national."

While foreign nationals may not make political contributions or sponsor independent expenditures, they may volunteer on political campaigns and may even solicit contributions, but not from other foreign nationals. In a matter arising from the 2008 elections, the FEC notably determined that British singer Elton John could headline a fundraising concert for Hillary Clinton's presidential campaign. The FEC also recently determined that a foreign national could act as a volunteer in creating intellectual property for a PAC where the PAC would assume joint ownership of the intellectual property, even though, as a general matter, foreign nationals may not make in-kind political contributions.

Foreign nationals also may not help manage a political campaign or PAC. This issue arises frequently in the context of PACs administered by the domestic subsidiaries of foreign corporations. While domestic subsidiaries of foreign corporations may sponsor PACs, no part of the corporate funds used to establish, administer, or fundraise for the PAC may come from the foreign parent company. Additionally, no foreign national may be involved in the PAC's operation or decisionmaking.

PACs, campaign committees, and political party committees should review their compliance policies and procedures to ensure that they are properly screening for foreign contributions and preventing foreign nationals from having any operational, managerial, or decisionmaking role. Violations of the foreign national prohibitions may carry not only serious legal penalties, they also may result in negative publicity about foreigners and foreign money influencing American elections.