

FEC Commissioners Evenly Split on Federal Contractor Question

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Federal law has long prohibited political contributions from federal contractors. Late last year, Federal Election Commission (FEC) commissioners were asked to consider whether this prohibition extended to a U.S. citizen, Christoph Mlinarchik, who was the sole member of a Virginia limited liability company (LLC) that was itself a federal contractor. Although the commissioners considered the issue over several months, they were unable to reach agreement on the analytical framework for the matter – much less the ultimate result – and thus no definitive opinion was issued.

A focal point of the Democratic commissioners' analysis was the fact that the LLC was treated as a "disregarded entity" for federal tax purposes. (The activities of disregarded entities activities are reflected on their owners' tax returns rather than on separate tax filings by the LLC.) Because the LLC and its owner were effectively treated as one entity for tax purposes, the Democratic commissioners believed that there was also "resulting unity" between the LLC and its owner for purposes of the prohibition on contributions by federal contractors.

The Democrats further anchored their analysis in the 2015 opinion from the United States Court of Appeals for the District of Columbia Circuit, *Wagner v. FEC*, 793 F.3d 1 (*en banc*), wherein that court upheld the federal contractor contribution prohibition as necessary to guard against *quid pro quo* corruption and to preserve the concept of merit-based public administration.

In particular, the Democrats felt that prohibiting Mr. Mlinarchik from contributing would help further the underlying goal of the statutory prohibition by preventing the appearance of corruption, as citizens

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observing a contribution from Mr. Mlinarchik might not see any difference between his funds and those of the LLC.

The Commission's three Republicans reached the opposite conclusion, reasoning that the issue was controlled by principles of state law regarding LLCs – not federal tax law – and that in Virginia, an LLC and its sole member were treated as distinct entities. The Republicans also noted that the Commission's regulations explicitly recognize that the prohibition on contributions by federal contractors does not apply to personal funds used by "employees, officers, or members" of such contractor. With the commissioners split 3-3 on the matter, no opinion was issued, leaving resolution of this question for a later date. In the upcoming months, the FEC is also expected to rule on one or more enforcement matters involving the federal contractor contribution prohibition, including a complaint filed against a construction company that reportedly gave \$200,000 to a super PAC supporting Hillary Clinton.