

Court of Appeals Affirms Conviction for False FEC Report

DECEPTIVE "PURPOSE" OF SUBCONTRACTOR PAYMENT DEEMED CRIMINAL

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On May 11, the U.S. Court of Appeals for the Eighth Circuit affirmed the conviction of three Ron Paul campaign officials for causing the campaign to file a false expenditure report with the Federal Election Commission (FEC). The Paul campaign paid \$73,000 to Iowa State Senator Kent Sorenson for performing various services. Sorenson posed for photographs with supporters, made television appearances, sent emails supporting Ron Paul, and recorded a mass phone call on behalf of the campaign. He also traveled to South Carolina and appeared at rallies in support of Paul and met with state legislators encouraging them to endorse Paul. Sorenson also endorsed Ron Paul for President.

Due to political sensitivities, namely that payment for an endorsement would appear unseemly, the campaign chose to pay Sorenson through a video production vendor, as a sub-contractor, and reported the purpose of the payment as "audio/visual services." The campaign officials argued that this description was technically accurate because Sorenson performed services that encompassed "audio" and media-related services. The U.S. Department of Justice (DOJ), however, argued that the actual purpose of the payment to Sorenson was for his endorsement and this purpose was falsified – and concealed – through the combination of the sub-contractor arrangement and the incorrect purpose of "audio/visual services."

The first trial in an Iowa federal court ended in a mistrial. The DOJ re-prosecuted a second time, with a jury convicting the campaign chairman, campaign manager, and deputy campaign manager on several counts, all related to the report of an expenditure to a video

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production company for the stated purpose “audio/visual services.” The campaign officials were convicted of:

- causing false records, in violation of 18 U.S.C. §§ 2 and 1519 (under the Sarbanes-Oxley Act of 2002);
- causing false campaign expenditure reports, in violation of the Federal Election Campaign Act (FECA), 52 U.S.C. §§ 30104(a)(1), (b)(5)(A), and 30109(d)(1)(A)(i) and 18 U.S.C. § 2;
- engaging in a false statements scheme, in violation of 18 U.S.C. §§ 2 and 1001(a)(1); and
- conspiring to commit the offenses listed above, in violation of 18 U.S.C. § 371.

The application of Sec. 1519 of the Sarbanes-Oxley Act to a FEC reporting violation marks the second time in the past year that federal appeals courts have opened this new legal risk for political committees and treasurers. The application of Sec. 1519 to FEC reporting is particularly significant because a violation carries more severe punishment than Congress prescribed for FEC reporting in the FECA. Moreover, the Sarbanes-Oxley Act was “designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation.” *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015). The Supreme Court of the United States has cautioned against “cut[ting] § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent.” *Id.* Nevertheless, the Eighth Circuit found that the Sarbanes-Oxley Act applies to FEC reporting, and the violation is in addition to a violation of the FECA. In so holding, the Eighth Circuit joined the U.S. Court of Appeals for the Second Circuit in holding that a defendant may properly be convicted for violations of the FECA and of Sec. 1519 for a single reporting violation. See *United States v. Rowland*, 826 F.3d 100 (2d Cir. 2016) (affirming convictions for violations of the FECA and 18 U.S.C. §§ 371, 1001, and 1519), cert. denied, 137 S. Ct. 1330 (2017). Thus, one false report can violate three laws: the FECA, the Sarbanes-Oxley Act, and the prohibition against false statements in Sec. 1001 of the federal criminal code.

The Eighth Circuit also was unimpressed by the vagaries of FEC expenditure reporting rules and approved descriptions. In the past, many have considered the approved purpose statements to be highly subjective and imprecise, especially in the case of multi-purpose vendors performing several services, but political committees have done the best they can to match expenditures with the FEC’s approved list of purposes. The Eighth Circuit’s decision reinforces the importance of consultation with FEC analysts when there are questions about appropriate purpose descriptions.

Although the Eighth Circuit did not per se rule out sub-contracting as a legitimate business arrangement for committees and vendors, the case does caution that sub-contracting, combined with the purposes reported, should not be used to disguise or conceal financial arrangements through non-bona fide sub-contracting arrangements. Although, expenditure purpose reporting has been deemed less consequential, practically and constitutionally, the 8th Circuit decision underscores the importance of accurate reporting of not only contributions but expenditures, including accurate purposes of all expenditures.