

Republication of Campaign Material Leads to Hefty Civil Penalty

January 2016

By Caleb P. Burns and Louisa Brooks

In a case of first impression, “Restore Our Future,” the super PAC that supported Mitt Romney’s 2012 presidential run, has agreed to pay a \$50,000 civil penalty as part of a Conciliation Agreement (Agreement) with the Federal Election Commission (FEC). The Agreement took shape after the Commission unanimously found reason to believe that Restore Our Future made an impermissible contribution to Romney’s official campaign committee by republishing campaign materials.

During the 2012 election cycle, Restore Our Future spent a reported \$4.3 million to run a television ad that borrowed substantial parts of an ad run by Romney’s 2008 presidential campaign, Romney for President.

Under the Federal Election Campaign Act of 1971, as amended (Act), and the FEC’s regulations, the republication of campaign materials prepared by the candidate or his campaign is considered a contribution for purposes of contribution limitations and reporting requirements.

Thus, in a Complaint filed with the FEC, the Campaign Legal Center alleged that Restore Our Future’s republication constituted a contribution to Romney’s presidential campaign. At \$4.3 million, such a contribution would far exceed any applicable limitation and thus be impermissible.

Authors

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

Practice Areas

Election Law & First Amendment Litigation
Election Law & Government Ethics
Federal & State Campaign Finance
Federal Election Commission
Representation
Government Ethics

Seemingly straightforward, the matter contained a significant legal wrinkle: Restore Our Future ran the ad during the 2012 election cycle, while the campaign material it republished was created five years earlier by Romney's 2008 presidential campaign. Restore Our Future contended that Romney's 2008 presidential campaign was legally distinct from his 2012 presidential campaign and thus the materials ROF borrowed from the 2008 campaign ad were not "campaign materials prepared by the candidate" for purposes of the 2012 election.

The Act and the regulations are silent as to whether the relevant provisions are limited to campaign materials prepared during the same election cycle in which a third party republishes the materials. The FEC acknowledged that the question was one of first impression and, further, that Restore Our Future's interpretation of the regulation's scope was not unreasonable.

Still, as the law refers to materials prepared by a candidate's "campaign committees," plural, the FEC concluded that nothing in the law limited its application to materials prepared for the concurrent election cycle. The FEC thus unanimously found reason to believe that Restore Our Future violated the Act by making prohibited and excessive in-kind contributions to Romney for President when it republished the campaign materials, and by failing to disclose the expenditures as contributions to Romney for President.

Perhaps easing the path to a "reason to believe" finding is the fact that Romney did not form a new and separate campaign committee for the 2012 election. Instead, Romney for President maintained its registration with the FEC following the 2008 election, and Romney eventually designated this same committee as his principal campaign committee for the 2012 election. Thus, there was no legal separation between his 2008 campaign and his 2012 campaign.

Given the unique circumstances and lack of precedent on the question, the FEC elected not to open an investigation. Rather, the FEC negotiated the Agreement with Restore Our Future, in which the super PAC agreed not to contest the FEC's conclusion that Restore Our Future made excessive in-kind contributions to Romney for President and failed to report the expenditures as contributions, and further agreed to a civil penalty of \$50,000.

Notably, Commissioners Ravel and Weintraub voted against the Agreement, balking at a \$50,000 penalty as far too low for "a high-dollar, clear-cut violation." The two Commissioners also disputed that Restore Our Future's interpretation of the law was "not unreasonable," and opposed the FEC's inclusion of this acknowledgment in its factual and legal analysis.

Following the resolution of this matter, super PACs would be wise to avoid republication of campaign materials even from previous election cycles and prior campaigns. And, in some cases, candidates may be wise to consider forming new campaign committees instead of re-designating their previous ones.