IN COMPLIANCE

HOLTZMAN VOGEL'S MONTHLY ROUND-UP

SUPREME COURT UPDATE

Supreme Court Issues Key Decisions on Public Officials' Use of Social Media and Ability to Block Commenters

On March 15, 2024, the Supreme Court issued a unanimous opinion in ***Lindke v. Freed*** and a per curiam opinion in ***O'Connor-Ratcliff v. Garnier*** addressing when a public official may prevent a person from commenting on the public official's social media page.

The Court held that a public official's social media activity is "public" and attributable to the State only if the public official "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." If this standard is not met, and the public official is found to have acted in a private capacity, then the blocking of a person's comments is permissible.

More information on the Court's decision is available here.

CORPORATE TRANSPARENCY ACT REPORTING

Federal District Court Invalidates Beneficial Ownership Reporting Rule

On March 1, Judge Burke of the U.S. District Court for the Northern District of Alabama, **struck down** the Corporate Transparency Act's beneficial ownership reporting requirements as unconstitutional. (We detailed these reporting requirements in our **January Round-Up**.) Under the rule, qualifying for-profit corporations, LLCs, and certain other entities are required to file a report with the Treasury Department's Financial Crimes Enforcement Network, known as "FinCEN," disclosing details about the reporting company and its individual "beneficial owners," that is, those who own and control the company. The lawsuit was brought by the National Small Business Association in 2022.

Judge Burke held that the reporting rule exceeded Congress's constitutional powers to regulate interstate commerce, foreign affairs, and taxation. The court explained, "[b]ecause the CTA exceeds the Constitution's limits on the legislative branch and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress' policy goals, the Plaintiffs are entitled to judgment as a matter of law."

On March 11, the government filed a notice of appeal. Shortly after the district court's ruling, FinCEN issued a **brief notice** advising that "the government is not currently enforcing the Corporate Transparency Act against the plaintiffs" in the Alabama decision. "Those individuals and entities are not required to report beneficial ownership information to FinCEN at this time." As a result, persons not involved in the Alabama district court decision remain subject to FinCEN's reporting requirements until the 11th Circuit Court of Appeals determines otherwise.

FEC UPDATE

FEC Advisory Opinion Opens Door to Coordinated Canvassing Programs

The FEC issued an important new advisory opinion on March 21, concluding that a paid, door-to-door canvassing operation conducted by a state PAC did not qualify as a "public communication." As a result, the state PAC may coordinate its canvassing effort with federal candidates without running afoul of the law.

The advisory opinion was requested by **Texas Majority PAC,** a Texas state PAC that supports Democrat candidates. Texas Majority PAC proposed to retain vendors to run a paid canvassing program that included developing literature to be distributed and a script to be read at pre-selected houses. The literature and scripts will include references to federal candidates and expressly advocate the election of those federal candidates. Texas Majority PAC said it would "consult" (i.e., coordinate) with federal candidates and party committees on the canvassing program.

This advisory opinion opens the door to paid canvassing operations around the country that are coordinated with and support federal candidates but are paid for with non-federal funds.

For more on Advisory Opinion 2024-01, please **click here**.

New Candidate Salary Regulation in Effect

The **FEC's new candidate salary regulations** went into effect on March 1. Under the new rules, candidates who are not incumbent federal officeholders may use campaign funds to pay themselves a salary that is lesser than either 50% of the minimum salary paid to a Member of the U.S. House of Representatives or the average annual income the candidate earned during the five most recent calendar years. Any amount that is payable according to this formula must be reduced by an amount equal to any income earned by the candidate for other employment after a Statement of Candidacy is filed. The new regulation does not establish rules for using campaign funds for healthcare costs and childcare expenses. For now, these topics will continue to be addressed by advisory opinions.

The FEC first allowed candidates to pay themselves from campaign funds in 2002 when the agency reversed its longstanding position on the issue. In revisiting its 2002 rulemaking, the Commissioners lowered the total amount that a candidate may permissibly receive but lengthened the period during which salary payments are permissible. Despite being permissible for over 20 years, candidates using campaign funds to pay themselves remains relatively rare.

FEC Adopts New Policy on Initial Stage Findings in Enforcement Proceedings

The FEC adopted a new **statement of policy** at its March 14 meeting to govern its treatment of enforcement matters at the initial stage of the review process. Going forward, the FEC will either vote to dismiss the matter or find "reason to believe" that a violation occurred. Under the new policy, which supersedes the agency's 2007 policy on the subject, the Commissioners will dispense with findings such as no reason to believe, dismissal with admonishment or cautionary letter, and simply closing the file without further action. The new policy is intended to more closely track the language of the statute and provide clarity.

DEPARTMENT OF JUSTICE UPDATE

DOJ Secures Guilty Plea in Case of Phony Super PAC and Credit Card Fraud

The Department of Justice **announced a guilty plea** in the bizarre case of Christopher Richardson and his fabricated Super PAC. Richardson registered the Super PAC "Americans for Progressive Action USA" with the FEC, listed a phony treasurer, and then filed false quarterly reports claiming to have raised $4.8 million while spending $1.5 million. It appears none of this was true, but Richardson "also used the alias of one of the fictitious donors to AFPA to obtain a credit card, and then used that card to conduct approximately 200 transactions." Richardson pleaded guilty to "false entry in a record" for submitted phony FEC reports, and "access device fraud" for his credit card fraud. His sentencing is scheduled for June 13.

POLITICO **first reported in 2020** that Americans for Progressive Action USA did not actually run the ads that were reported to the FEC.

Chinese National Pleads Guilty to Making Straw Donor Contributions

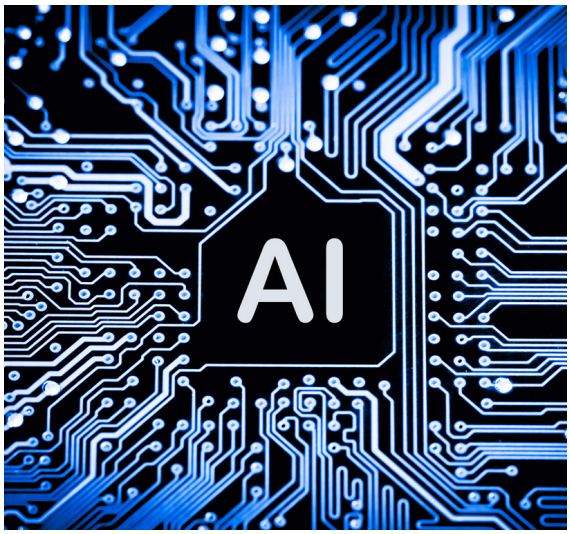
On March 18, the Department of Justice **announced** that Hui Qin pleaded guilty to making contributions in the name of another. Qin is a billionaire Chinese citizen who was a lawfully admitted U.S. resident, although his guilty plea includes an admission that his application was falsely obtained. He used "straw donors" to make over $11,600 in contributions to a New York City candidate and two congressional candidates.

The involvement of the Department of Justice in a matter involving a relatively small sum is a good reminder that the Federal Election Campaign Act's contribution in the name of another prohibition remains a "core" violation that prosecutors take very seriously.

FEDERAL LEGISLATION UPDATE

New AI Disclaimer Bill Introduced; Includes Provisions for Expedited FEC Review

Senators Lisa Murkowski (R-AK) and Amy Klobuchar (D-MN) **introduced new legislation** to require disclaimers on political advertising that uses artificial intelligence (AI) to generate or alter images, audio, or video content. The text of the AI Transparency in Elections Act of 2024 is available **here.** The new legislation also includes special enforcement provisions for alleged violations, including an expedited FEC review period (45 days rather than the standard 120 days), pre-determined penalty amounts, and a provision that treats the failure to respond to notice of a complaint as an "admission of the factual allegations of the complaint."



Senator Klobuchar **previously spearheaded legislation** to "ban the use of artificial intelligence (AI) to generate materially deceptive content falsely depicting federal candidates in political ads." She also sponsored the **REAL Political Advertisements Act**, which imposed a new disclaimer requirement for political ads with AI content, but also expanded the scope of the term "electioneering communication" to include online and digital advertising.

STATE CAMPAIGN FINANCE & ETHICS UPDATE

Maine and Minnesota

A federal judge recently **suspended the enforcement of a new Maine law** barring "foreign government-influenced entities" from spending in referendum elections. The law stemmed from a 2021 ballot referendum question pertaining to the construction of a new electric transmission line. H.Q. Energy Services (U.S.) Inc. ("HQUS"), which is a subsidiary of the Canadian company Hydro-Quebec, spent over $22 million to encourage Maine voters to reject the initiative.

Maine lawmakers responded with legislation prohibiting a "foreign government-influenced entity" from making contributions or expenditures to influence candidate election or referenda. A "foreign government-influenced entity" was defined as an entity in which a foreign government directly or indirectly held an ownership stake of as little as 5 percent. The Governor vetoed this legislation, but it was placed on the ballot as a citizen initiative. The measure was approved by a wide margin.

On February 29, 2024, U.S. District Judge Nancy Torresen issued a preliminary injunction after finding the ballot measure raised significant First Amendment concerns. Judge Torresen found that the 5 percent foreign ownership threshold "would prohibit a substantial amount of protected speech," and "deprive the United States citizen shareholders – potentially as much as 95% of an entity's shareholders – of their First Amendment right to engage in campaign spending." As a result, the Maine law may not be enforced until the case is resolved.

This decision in Maine follows a **similar order that was handed down in Minnesota** in December 2023. In the Minnesota case, the federal district court considered a campaign spending ban imposed on "foreign-influenced corporations." Minnesota's law was even more stringent than Maine's and applied to corporations in which a single foreign investor held 1% of the company's equity, two or more foreign investors hold 5% equity, or a foreign investor participates in the corporation's decision-making process with respect to engaging in political activities. As in the Maine case, the court found the Minnesota law was not "narrowly tailored" because it swept far more broadly than was justified by the state's legitimate interests in preventing foreign spending in U.S. elections. As the Minnesota court noted, Minnesota's law would disqualify 98% of S&P 500 companies and 28% of smaller publicly traded companies from spending in Minnesota's elections.

In recent years, new spending prohibitions on "foreign-influenced" companies have been advocated by those seeking to blunt the impact of Citizens United. Critics argue these laws are intended to hamstring as many would-be corporate spenders as possible. Early results from Maine and Minnesota suggest that more tightly drawn thresholds will need to be drawn before courts will uphold these laws.

Oregon Approves Contribution Limits

Oregon **adopted state contribution limits** that will go into effect in 2027. State elections in Oregon have not been subject to contribution limits since 1997, when the Oregon Supreme Court struck down a comprehensive campaign finance measure and held that contribution limits violated the state constitution's free speech guarantees. The court reversed that ruling in 2020 when it upheld a local contribution limit.

The new law's contribution limits generally track the current federal limits, although, unlike federal law, Oregon will permit corporate contributions. Contributions from individuals and corporations to state candidates will be limited to $3,300 per election, or $6,600 for candidates running in both the primary and general election. PACs will be able to contribute up to $5,000 per election cycle to a state candidate.

This update is for informational purposes only and should not be considered legal advice. Entities should confer with competent legal counsel concerning the specifics of their situation before taking any action.

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