CRS Reports & Analysis

Legal Sidebar

Foreign Money and U.S. Elections

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Recently, questions have arisen regarding how federal law restricts the involvement of foreign nationals in U.S. political campaigns. This Sidebar provides an overview of the prohibitions on foreign money under federal campaign finance law.

Prohibition on Contributions and Expenditures

The Federal Election Campaign Act (FECA) generally prohibits foreign nationals from directly or indirectly donating or spending money in connection with any U.S. election. A foreign national is defined to include a foreign government, a foreign political party, and a foreign citizen, excepting those holding dual U.S. citizenship and those admitted as a lawful permanent resident of the U.S. (i.e., a "green card" holder). Specifically, the law prohibits foreign nationals from directly or indirectly making a contribution "or other thing of value" in connection with any U.S. election; or a contribution or donation to a political party. It is important to note that any communication, such as a political advertisement, that is made in coordination with a candidate's campaign or political party is considered an in-kind contribution and may be similarly treated as a contribution. In addition, FECA prohibits the knowing solicitation, acceptance, or receipt of contributions from foreign nationals.

The law also prohibits foreign nationals from making expenditures; independent expenditures, which are communications that expressly advocate the election or defeat of a clearly identified candidate that are not made in concert or cooperation with a candidate or party; and disbursements for electioneering communications, which are broadcast, cable, or satellite communications that refer to a federal office candidate and are made within 30 days of a primary or 60 days of a general election. FECA regulations specify that it is unlawful to knowingly provide "substantial assistance" in the solicitation, making, acceptance, or receipt of a prohibited contribution or donation, or in the making of a prohibited expenditure, independent expenditure, or disbursement.

In addition, FECA regulations specify that foreign nationals are prohibited from directing or participating in the decision-making process of entities involved in U.S. elections, including decisions regarding the making of contributions, donations, expenditures, or disbursements in connection with any U.S. election or decisions concerning the administration of a political committee. In a series of advisory opinions, the Federal Election Commission (FEC) has provided specific guidance for compliance with the prohibitions on foreign nationals. For example, the FEC has found that a U.S. corporation that is a subsidiary of a foreign corporation may establish a political action committee (PAC) that makes contributions to federal candidates, as long as the foreign parent corporation does not finance any contributions, either directly or through a subsidiary, and no foreign national participates in PAC operations or decision making.

In 2012, the Supreme Court summarily affirmed a three-judge federal district court panel ruling that upheld the constitutionality of the prohibition on foreign nationals making campaign contributions and independent expenditures. The district court held that for the purposes of First Amendment analysis, the United States has a compelling interest in limiting foreign citizen participation in American democratic self-government, thereby preventing foreign influence over the U.S. political process. A key element of a national political community, the court observed, is that "foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."

Disclosure Requirements

In part, in order to facilitate enforcement of FECA, including the prohibitions on foreign nationals, FECA requires candidate campaign committees and other political committees, which include PACS, to register with the FEC and comply with disclosure requirements. Such requirements include filing periodic reports that include the total amount of all contributions received and the identity of any person who contributes more than $200 during a calendar year. In addition, labor unions, corporations, including incorporated tax-exempt § 501(c) organizations, and other groups making independent expenditures (IEs) or electioneering communications (ECs) are generally required to disclose certain information to the FEC, including the identity of their donors over certain dollar thresholds. However, the requirements for donor disclosure generally apply only to those donors who contributed "for the purpose of furthering" the IE or EC. As a result, unless a donation to an organization is made specifically for the purpose of funding an IE or EC, disclosure of the donor's identity is not required. This "purpose requirement" for donor disclosure has been challenged in court, but was most recently upheld in 2016.

Criminal Penalties

In addition to civil penalties, violations of the prohibitions on foreign nationals are subject to criminal penalties under FECA, (with the exception of infractions involving disbursements for ECs.) Generally, FECA provides that any person who knowingly and willfully commits a violation of any provision of FECA – including violations of the law concerning foreign money – that involves the making, receiving, or reporting of any contribution, donation, or expenditure of $25,000 or more per calendar year shall be fined under Title 18 of the United States Code (up to $250,000 for each offense by an individual and up to $500,000 for each offense by an organization), or imprisoned for not more than five years, or both. If the amount involved is $2,000 or more per calendar year, but is less than $25,000, the law provides for a fine under Title 18 (up to $100,000 for each offense by an individual and up to $200,000 for each offense by an organization), or imprisonment for not more than one year, or both. In accordance with the Bipartisan Campaign Reform Act of 2002, sentencing guidelines were enhanced for violations of the law if the offense involves foreign nationals (two levels) or a foreign government (four levels).

In most instances, the U.S. Department of Justice initiates the prosecution of criminal violations of FECA, but the law also provides that the FEC may refer an apparent violation to the Justice Department for criminal prosecution under certain circumstances. Specifically, if the FEC, by an affirmative vote of four commissioners, determines that there is probable cause to believe that a knowing and willful violation of FECA involving a contribution or expenditure aggregating over $2,000 during a calendar year has or is about to occur, the FEC may refer the apparent violation to the U.S. Attorney General. In such instances, the FEC is not required to attempt to correct or prevent such violation.

For related reading, see *Foreign Money and U.S. Campaign Finance Policy*; *Campaign Finance Law: What is a "Coordinated Communication" versus an "Independent Expenditure"?*; and *Campaign Contributions and the Ethics of Elected Officials: Regulation Under Federal Law.*

Categories: Campaign Finance; Constitutional Law; Elections

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