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SPECIAL FEATURE

A straw donor by any other name is still a straw donor

By Christopher J. Hunter

Money is the mother's milk of politics, the late California politician Jesse Unruh observed more than 50 years ago. Like it or not, with each election cycle, money has become ever more important to nurturing and sustaining political campaigns.

As we enter the home stretch of the 2010 election cycle, the pressure to raise and spend money will intensify as campaigns seek to reach voters who typically focus on an election only when it is imminent.

A candidate can have a strategy, a message and a mission, but without money the strategy will not be executed, the message will not be delivered, and the mission will be unfilled. The singular importance of money's impact is why, with each election cycle, reports always surface of campaign finance irregularities.

One such recurring report involves a donor's use of straw contributors to leverage the donor's impact. The practice has been understood to be impermissible for about as long as campaign finance has been regulated. But each election cycle brings new allegations of an employer using employees as straw contributors to get around contribution limits or prohibitions on corporate giving.

The Department of Justice and the Federal Election Commission have regularly used Title 2, U.S. Code, Section 441f of the Federal Elections Campaign Act in their enforcement actions alleging the use of straw donors.

Section 441f prohibits campaign contributions made in the name of another person. The applicability of Section 441f to the use of straw donors was recently called into question, however, in an ongoing criminal case.

'O'Donnell' and Section 441f

For nearly a year, prominent Los Angeles attorney Pierce O'Donnell seemed to have beaten the criminal case the DOJ brought against him alleging the use of straw contributors in violation of Section 441f.

O'Donnell was indicted in 2008 for allegedly contributing $26,000 of his own money to the presidential campaign of John Edwards during the 2004 election using 13 individuals who were mostly employees of his law firm.

According to the indictment, the individuals each donated $2,000 in their own names with the understanding that O'Donnell would reimburse them. The grand jury charged O'Donnell with violating Section 441f, which prohibits making a campaign "contribution in the name of another person," as well as receiving campaign contributions made by one person in the name of another.

The prohibition covers three categories of people: the original source of the money who advances or reimburses money to another person — the straw donor — to donate; the straw donors themselves; and the campaign that receives money from straw donors.

There is no limiting language in the statute, such as a prohibition on only "indirect" contributions in the name of another person or only "direct" contributions in the name of another person.

While the term "straw donor" is not in the text of Section 441f, the phrase "contribution in the name of another person" has been interpreted by the FEC, the DOJ and federal courts to include a prohibition on straw donor activity.

The government's recent success with Section 441f is all the more reason to be aware of the law and avoid risks from potentially violating it.

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In regulations the FEC promulgated for the FECA, the first example chosen to illustrate the type of conduct Section 441f prohibits is the straw donor scenario: "Examples of contributions in the name of another include … [g]iving money … all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money[.]" 11 C.F.R. § 110.4(b)(2)(i).

The seventh edition of "Federal Prosecution of Election of Offenses," authored by two DOJ lawyers, explains that "Section 441f violations occur when a person gives money to straw donors, or conduits, for the purpose of having the conduits pass the funds on to a specific federal candidate as their own contributions."

Beginning in 1979 with *United States v. Hankin*, a 3rd Circuit case involving alleged FECA violations, up until the O'Donnell case federal courts have generally accepted Section 441f's application to straw donor activity without extensive discussion.

That general acceptance was unsettled in June 2009 when the federal District Court judge presiding over *O'Donnell* dismissed both Section 441f charges, pretrial.

O'Donnell had argued that Section 441f prohibited only direct "false name" contributions, not indirect straw donor contributions.

In other words, Section 441f applied only when a person pretended to be another person by using the other person's name in making a direct contribution to a campaign. It did not apply when a person indirectly contributed money to a campaign by giving money to another person for him to contribute in his true name, the rationale went.

The District Court judge agreed, relying on other sections of the FECA to conclude that Section 441f prohibited only direct contributions made using a false name, not indirect contributions using a conduit, or straw.

Last June, the 9th Circuit overturned the dismissal of the Section 441f charges. Relying on the text, purpose and structure of Section 441f, and noting the absence of precedential caselaw on the topic, the 9th Circuit held that Section 441f "unambiguously applies to a defendant who solicits others to donate to a candidate for federal office in their own names and either advances the money or promises to — and does — reimburse them for the gifts," and thus prohibits straw donors.

Last June, O'Donnell requested a rehearing or en banc review before the 9th Circuit to further argue for the adoption of a more limited interpretation of Section 441f.

'Boender' and other 441f enforcement actions

Concurrent with O'Donnell, another individual was convicted of Section 441f violations in Chicago after losing pre-trial litigation over the meaning of Section 441f using the very same arguments on which O'Donnell had initially prevailed.

Calvin Boender was a Chicago real estate developer who was indicted in 2009 along with a city alderman on corruption-related charges involving the re-zoning of land on Chicago's West Side.

Two of the charges were Section 441f violations based on allegations that Boender directed other people to make contributions to the congressional campaign of the alderman's relative and then reimbursed them for the contributions.

Like O'Donnell, Boender moved to dismiss the charges, arguing that Section 441f did not prohibit reimbursing contributions made by others. But Boender lost his motion last February while O'Donnell's appeal was pending.

The District Court judge in Boender's case found the judge's opinion in *O'Donnell* unpersuasive, his analysis presaging the 9th Circuit's reversal in *O'Donnell*.

Boender proceeded to trial and was convicted last March of bribery, obstruction of justice and the campaign finance violations. He was sentenced to 46 months in prison.

A civil complaint filed with the FEC last April alleged that a dry cleaning corporation reimbursed several of its employees for $38,000 in contributions made to a U.S. Senate candidate in Louisiana in violation of Section 441f. The company reportedly wanted to enhance its chances of securing economic stimulus funds.

And last month in Virginia, an indictment was unsealed charging a lobbyist with using his company's money and his personal funds to advance or reimburse hundreds of thousands of dollars in campaign contributions made by others, a violation of Section 441f.

An employee of the lobbyist has pleaded guilty to campaign finance violations and is expected to cooperate against the lobbyist and perhaps others.

As these cases demonstrate, the temporary setback the DOJ suffered in *O'Donnell* did not deter continued use of Section 441f to allege straw donor violations. More enforcement actions are expected heading into the mid-term elections as government enforcement officials capitalize on their successful use of Section 441f in *Boender* and their successful appellate defense, so far, of Section 441f in the *O'Donnell* case.

Risk avoidance

Whether the government chooses to use Section 441f or any other enforcement tool to investigate and punish straw donor activity, its recent success with Section 441f is all the more reason to be aware of the law and avoid risks from potentially violating it.

The risk continuum for engaging in straw donor activity begins with adverse publicity from news reports and ends with a federal criminal investigation that could result in jail time and/or a substantial fine.

In Massachusetts, a well-known businessman served a split probation/home confinement sentence and paid a $1 million fine, while his company paid $5 million, because he was convicted of reimbursing straw donor employees. That was more than a decade ago, before the penalties for campaign finance violations were significantly increased through the Bipartisan Campaign Reform Act of 2002.

Employers, especially those in regulated industries, should be thoughtful about employee compensation during and after the 2010 mid-term elections. Companies that award bonuses on a quarterly (the month before or after the election) or annual basis should take care not to link bonuses in any way to employees donating money to company-favored candidates.

Similarly, individuals who desire to raise substantial sums for their candidates should be aware of the law so that they do not inadvertently risk violating it.

Bundling campaign contributions is a perfectly acceptable fundraising practice, but individuals who do the bundling should understand that reimbursing people whose donations are bundled will violate Section 441f.

In every election cycle, campaigns and parties encourage robust campaign contributions so that they can afford to get their message out. This cycle is no different. Brushing up on campaign finance law now will help clients exercise their First Amendment right to participate in the political process through fundraising without worry that a misunderstanding of permissible practices will result in unwanted legal risk later.

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