IN COMPLIANCE

HOLTZMAN VOGEL'S MONTHLY ROUND-UP

FEC UPDATE

FEC Advisory Opinion Approves Federal Candidate Request to Add Super PAC to Joint Fundraising Committee

In **Advisory Opinion 2024-07**, the FEC approved a request made by Team Graham, the principal campaign committee of Senator Lindsey Graham, to add a Super PAC to an existing joint fundraising committee named Graham Majority Fund. Graham Majority Fund includes Team Graham, as well as Senator Graham's leadership PAC, Fund for America's Future, and the National Republican Senatorial Committee (NRSC). Holtzman Vogel was proud to prepare this advisory opinion request on behalf of Team Graham.

Under the approved request, Graham Majority Fund may add a Super PAC as a participating committee. The Super PAC, however, may not raise unlimited funds through the joint fundraising committee; rather, any funds raised by the Super PAC through Graham Majority Fund activities must be limited to federally permissible funds. In other words, when fundraising through Graham Majority Fund, the Super PAC must observe the contribution limits and source prohibitions that apply to an ordinary federal PAC. This limitation ensures that Senator Graham, his campaign committee, and the NRSC adhere to the soft money restrictions in federal law.

As approved by the FEC, the expanded joint fundraising committee may distribute public communications in the form of solicitations, invitations, and similar fundraising event announcements. The joint fundraising committee's participants may collaborate with respect to these fundraising event and solicitation materials, as well as coordinate scheduling logistics. In addition, the joint fundraising committee participants may share data and information as required under their joint fundraising agreement and FEC regulations to ensure proper reporting and adherence to contribution limits. As with any joint fundraising committee, the participants must share committee expenses proportionally from the fundraising proceeds.

Importantly, the collaboration authorized under the FEC's advisory opinion must be limited to the joint fundraising committee's activities. Senator Graham and his campaign may not discuss the nonpublic campaign plans, projects, activities, or needs of Senator Graham or his campaign with the Super PAC. Team Graham represented to the FEC that it will not make any coordinated communications with the Super PAC.

This new advisory opinion is a significant expansion of the FEC's fundraising rules and creates new opportunities for federal candidates, but with important limitations. Any candidate that wishes to participate in a joint fundraising committee with a Super PAC should first consult with counsel to ensure that proper guardrails and internal processes are established to prevent improper coordination.

FEC Declines to Open AI Rulemaking and Issues Interpretive Rule Maintaining Existing Law

On September 19, the FEC **voted against initiating a rulemaking** on the use of artificial intelligence in political advertising and adopted an **interpretative rule** stating that existing rules on "fraudulent misrepresentation" are technology neutral and apply in the AI context. The Commission specifies in its interpretive rule that "[t]he legal question is whether the actor fraudulently holds himself or herself out as 'acting for or on behalf of any other candidate or political party or employee or agent thereof. This fraud may be accomplished using AI-assisted media, forged signatures, physically altered documents or media, false statements, or any other means. The statute, and the Commission's implementing regulation, is technology neutral."

The interpretive rule maintains the Commission's existing interpretation of the Federal Election Campaign Act's prohibition on "fraudulent misrepresentation" and rejects the expansion of the rule urged by Public Citizen in its **rulemaking petition** that would have prohibited so-called "deepfakes" in campaign ads.

FEC Adopts Regulation Authorizing Use of Campaign Funds to Pay Security Expenses

On September 19, the FEC **approved a regulation** that codifies a series of advisory opinions allowing candidates and officeholders to use campaign funds to pay for various home security upgrades, personal security, and cybersecurity expenses. The new regulation provides that campaign funds may be used to pay the reasonable costs of security measures for a federal candidate, officeholder, members of their family, and employees, so long as the security measures address ongoing dangers or threats that would not exist irrespective of the individual's status or duties as a federal candidate or federal officeholder. The regulation specifically addresses both structural and non-structural home security devices, security personnel and services, and cybersecurity software, devices, and services.

Sixth Circuit Upholds Coordinated Party Spending Limits and Tees Up Issue for Supreme Court Review

On September 6, 2024, the en banc U.S. Court of Appeals for the Sixth Circuit released its decision in ***NRSC et al. v. FEC et al.***, No. 24-3051. The Court, by a vote of 15-1 with all active judges participating, declined to distinguish the case from Supreme Court precedent and denied the NRSC's request to find the coordinated limits unconstitutional. These rules, codified at 52 U.S.C. § 30116(d), limit the amount that federal party committees may spend in coordination with the House and Senate candidates that they support during the general election campaign. The applicable limits are tied to the population of each State.

All but one of the judges agreed that the outcome of this challenge was controlled by the U.S. Supreme Court's 2001 decision in ***FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431***, which to date has not been overturned or revisited. In the decision, known as Colorado II, a five-Justice majority agreed that the limits were justified by the government's interest in preventing corruption or the appearance thereof, and that in the absence of such limits, donors could circumvent the Act's contribution limits by giving additional funds to party committees instead. The prevailing theory was that a donor who wanted to exert improper influence over a candidate, but had already contributed the maximum amount to the candidate's campaign, would then contribute to the party with the understanding that the party would spend that money in coordination with the candidate.

Although the Sixth Circuit agreed that *Colorado II* controlled here, there was substantial disagreement among the judges beneath the surface. At least six of the sixteen judges expressed serious concerns with the constitutionality of the limits, and one judge (Judge Readler) issued a dissent arguing that the court should strike down the limits. In a concurring opinion joined by three of his colleagues, Judge Thapar wrote that the *Colorado II* decision "allows us to dodge the grave constitutional issues posed by coordinated-party-spending limits" which "run afoul of modern campaign-finance doctrine and burden parties' and candidates' core political rights."

An appeal to the U.S. Supreme Court is now virtually certain, which means that the case could be heard and decided as soon as next term. Both the composition of the Supreme Court and its approach to campaign finance issues has changed substantially since *Colorado II*. If the Supreme Court hears the case, a reversal of *Colorado II* will be a distinct possibility.

Corporate Regulation and Deregulation After the 2024 Presidential Election - Part 2

In August, Holtzman Vogel attorneys Phillip Gordon and Caleb Acker authored "**Corporate Regulation and Deregulation After the 2024 Presidential Election**" in *Corporate Counsel*. They explained why people should be focused on the next President's administrative state policies. In **Part 2,** they look forward to a new administration and propose top-level guidance for corporations and their counsel to start planning or implementing now, and then after the election, in preparation for January 20, 2025.

A Post-Election Pardon for Hunter Biden?

Holtzman Vogel's Jonathan Fahey and Andrew Pardue **wrote on a possible post-election presidential pardon** for Hunter Biden in *The Federalist*. They write, "If a pardon is the ultimate outcome that Hunter expects, his decision to plead guilty makes perfect sense. He has technically accepted responsibility for his actions while saving the time and embarrassment of another criminal trial. Only time will tell, but the smart money is on President Biden granting Hunter a full pardon after the November 5 election."

Religious Nonprofits File Lawsuit Challenging IRS Ban on Political Activity By 501(c)(3) Groups

On August 28, 2024, a group of religious nonprofit organizations **filed a lawsuit** challenging the ban on engaging in campaign-related political activity that applies to section 501(c)(3) organizations. **Since 1954**, charitable organizations that operate under section 501(c)(3) of the tax code have been prohibited from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." This prohibition, colloquially known as the Johnson Amendment, applies to all section 501(c)(3) organizations, including churches, educational institutions, and other charitable entities.

The lawsuit was filed in the U.S. District Court for the Eastern District of Texas and alleges that the Johnson Amendment violates the First Amendment's free speech protections "[i]nsofar as this section prohibits nonprofit organizations organized under § 501(c)(3) from speaking freely about political candidates." The plaintiffs cite several examples that they claim show the IRS has failed to enforce the Johnson Amendment evenly by "routinely allow[ing] favored organizations to openly and notoriously violate" the prohibition. The lawsuit asks the court to declare the Johnson Amendment unconstitutional and enjoin the IRS from enforcing its provisions against any section 501(c)(3) organization.

Importantly, the lawsuit does not seek a resolution to this issue prior to the 2024 election, and the organizations that filed the suit have not asked the court to move quickly. In the meantime, and until the courts invalidate the Johnson Amendment, section 501(c)(3) organizations must continue to abide by its campaign activity restrictions and refrain from engaging in political activities in support of or opposition to any candidate.

Recap: Election Day Operations and Post-Election Litigation Webinar

Holtzman Vogel partners Jessica Furst Johnson and Phil Gordon teamed up to host a webinar on what to expect – and how to prepare for the unexpected – for Election Day 2024, and the days and weeks beyond. Discussion covered preparation for the canvass and potential post-election activity, and the ways in which lawyers, consultants, volunteers, and other political actors can prepare to assist campaigns and candidates as the election nears closer.

With the caveat that every state and jurisdiction has differing laws, procedures, and guidance governing voting and election-day operations, the tips shared provided a **broad overview** of the issues candidates and committees should be thinking about prior to Election Day.

STATE ACTIVITY UPDATE

New York "Preclearance" Rules Take Effect September 22

Holtzman Vogel's Joe Burns authored an **op-ed published in the *New York Post*** on New York's new "preclearance" requirement. As Burns explains, "Starting Sept. 22, a provision of the state Voting Rights Act will require certain local governments **to seek "preclearance"** from the state Attorney General or a designated court to make many election-related decisions — including some that are relatively minor."

The New York Attorney General **explains** that "beginning September 24, 2024, certain jurisdictions that wish to make changes to their voting or elections procedures must have their changes reviewed and approved (precleared) by OAG [Office of Attorney General] or a state court." **Final regulations** on the new requirement were published September 11. Jurisdictions subject to the new oversight rules were selected by the Attorney General's Office, which asserts that selections are based on "hav[ing] a history of violating voting or civil rights, arresting certain groups at higher rates, or having highly segregated neighborhoods."

California Adopts Laws Governing Use of AI in Political Advertising

On September 17, 2024, California Governor Gavin Newsom signed into law three bills governing the use of artificial intelligence (AI) in political advertisements. The most impactful of these is **Assembly Bill No. 2839**, which was passed as an "urgency statute" to take immediate effect before the "first-ever artificial intelligence (AI) election."

New Restrictions. The new law prohibits "a person, committee, or other entity from knowingly distributing an advertisement or other election communication" that contains "certain materially deceptive content" during specific periods surrounding an election. "Materially deceptive content" is defined as "audio or visual media that is intentionally digitally created or modified, which includes, but is not limited to, deepfakes, such that the content would falsely appear to a reasonable person to be an authentic record of the content depicted in the media."

Existing California law already prohibits this conduct within 60 days of an election. The new law, however, expands the prohibition to within 120 days of an election in California, and within 60 days after an election if the deceptive material portrays "[a]n elections official . . . doing or saying something in connection with an election in California that the elections official did not do or say if the content is reasonably likely to falsely undermine confidence in the outcome of one or more election contests." Additionally, the 60-day post-election period applies to deceptive content that portrays "[a] voting machine, ballot, voting site, or other property or equipment related to an election in California [ ] in a materially false way if the content is reasonably likely to falsely undermine confidence in the outcome of one or more election contests."

Scope. The new law covers content that deceptively portrays "[a] candidate for any federal, state, or local elected office in California [ ] as doing or saying something that the candidate did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate." The law purports to include "any person running for the office of President of the United States or Vice President of the United States who seeks to or will appear on a ballot issued in California." Finally, the law covers depictions of election officials and "voting machine[s], ballot[s], voting site[s], or other property or equipment related to an election in California."

Two exceptions may apply. First, the prohibition "does not apply to a candidate portraying themself as doing or saying something that the candidate did not do or say if the content includes a disclosure" that meets certain requirements. Second, the prohibition "does not apply to an advertisement or other election communication containing materially deceptive content that constitutes satire or parody" if the communication includes a similar disclosure.

Additional State Efforts. In addition to California, at least 25 other states have passed or are considering passing bills to regulate AI-generated content in election communications. Following the passage of Colorado's **HB24-1147**, which requires a disclaimer to be included with AI-generated elections communications content, Colorado Attorney General Phil Weiser "warned voters to be on the lookout for election misinformation and disinformation in the form of realistic-looking images, videos, and audio created using artificial intelligence" and issued a **public advisory** to educate the public about the new bill and the growing dangers of AI-generated content. In a similar effort, New York Attorney General Letitia James **released a guide** to help the public recognize AI-generated misinformation.

HV Making the Rounds

- Jessica Furst Johnson and Phil Gordon presented a webinar on legal considerations and strategy for election day operations, and post-election litigation.
- Joe Burns presented a CLE on election law for the NY RNLA geared towards Pennsylvania and New York election day volunteers.
- Andy Gould appeared on Fox News to discuss Trump illegal migrant plan.
- Steve Roberts and Jessica Furst Johnson will be speakers at the Election Symposium hosted by the *Harvard Journal on Law & Public Policy* and the Heritage Foundation.
- Jonathan Fahey, Jonathan Lienhard and Andrew Pardue presented on the National Voter Registration Act for William & Mary's Election Law Society.
- Andy Gould moderated a panel on Arizona election policy, litigation and politics.
- Joe Burns authored "Court of Appeals must reverse lower court's decision on how absentee ballots are counted" for the *Times Union*.
- Jan Baran was the panel leader for "Criminal and Civil Enforcement of Election and Ethics Laws" at the annual PLI Corporate Political Activities conference.
- Andy Gould quoted in various Arizona publications on the firm's success for a LD15 candidate in an Arizona residency challenge.
- Steve Roberts appeared on Fox's LiveNow to discuss New York FARA investigation.
- Jonathan Fahey remains a consistent guest on Fox News' "Mornings with Maria" to discuss political news of the day.
- Steve Roberts spoke on the "Pros and Cons of Social Media and Elections" at the Public Affairs Council's Government Relations & Policy Conference in DC.
- Andy Gould appeared on TV and in publications on firm's success in keeping the Tipped Workers Protection Act on the Arizona ballot.
- Joe Burns was quoted in a *Southshore Press* article, "Golden Day in New York Bumps Up Against the Intent of the Constitution."
- Nicole Kelly will present an election day operations CLE for the Nevada RNLA.
- Jonathan Fahey and Andrew Pardue authored "Hunter Biden Pled Guilty So His Corrupt Dad Can Pardon Him After the Election" for *The Federalist*.
- Jason Torchinsky was quoted in *Associated Press* article, "A secretive group recruited far-right candidates in key U.S. House races."
- Joe Burns authored an op-ed for the *New York Post*, "New state law gives Letitia James power over NY's closest election contests."
- Phil Gordon and Caleb Acker authored "Part II: Corporate Regulation and Deregulation After the 2024 Presidential Election" for *Corporate Counsel Magazine*.
- Nicole Kelly quoted in *New York POLITICO Playbook* on NY FARA Investigation.
- Joe Burns mentioned in *Daily Gazette* article. "Lawsuit to boot Vroman from Montgomery Country race tossed."
- Jessica Furst Johnson spoke on an AAPC panel discussing state voting laws.

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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