



Business Crimes

Bulletin®



Volume 11, Number 4 • May 2004

Tougher Penalties, More Prosecutions

Campaign Finance Law Violators Face the Fire

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Although the McCain-Feingold Campaign Reform Act took effect almost 18 months ago, little attention has been paid to changes it made in the enforcement of federal campaign finance law, including big penalties for violations and sentencing guidelines that mandate incarceration for most criminal convictions. Notably, the Act — P.L. 107-155, officially called the Bipartisan Campaign Reform Act of 2002 (BCRA) — has increased the risk of criminal prosecution as well as the penalties.

Congressional directives to treat campaign finance violations more seriously have led the Federal Election Commission (FEC) and Department of Justice (DOJ) to reconsider the 1977 Memorandum of Understanding (MOU) that defined their respective enforcement roles and, importantly, determined the cases that are appropriate for criminal prosecution. While election enforcement officials claim publicly that the new MOU will not alter the basic institutional equation for campaign finance enforcement (see *Justice Officials Give Election Lawyers Mixed Message on BCRA Enforcement*, *BNA Money & Politics*, Feb. 2, 2004), it is difficult to imagine that DOJ will not assume a more pro-active, assertive enforcement posture with regards to campaign finance violations.

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BACKGROUND

The Federal Election Campaign Act of 1971 (FECA), as amended, 2 U.S.C. §§ 431-55, regulates the finance of federal elections. Violators of the law are subject both to civil and criminal liability, with DOJ and FEC empowered to conduct dual investigations of the same alleged or possible violations. The FEC is granted exclusive jurisdiction for enforcing all civil violations and, pursuant to the 1977 MOU entered into between the FEC and DOJ, non-serious "knowing and willful" violations. Serious violations, *ie*, those cases involving violations of the core provisions of FEC that are aggravated as to their intent and in monetary amount, are referred to DOJ for criminal prosecution. 43 Fed. Reg. 5441 (1978).

Prior to BCRA, however, prosecution was unlikely. First, "knowing and willful" violations of the law were punishable as misdemeanors, with the maximum sentence of 1 year. This left the government with little leverage to negotiate plea agreements. FECA prosecutions also were subject to a 3-year statute of limitations (the norm is 5 years), which further frustrated criminal investigations. In cases involving egregious violations, prosecutors sometimes resorted to other laws with more severe penalties and a longer statute, such as 18 U.S.C. §§ 371 (conspiracy to commit a crime or defraud the US Government), 1001 (false statements), and 1341-46 (mail fraud). While these laws provided prosecutors with an alternative avenue, they ordinarily required prosecutors to prove additional elements. *See, e.g., United States v. Curran*, 20 F.3d 560 (3rd Cir. 1994).

The shortcomings of FECA's enforcement provisions became evident in the late 1990s, during investigations into the financing of the 1996 presidential election. Although substantial amounts of illegal contributions were discovered, the prosecu-

tions that followed were resolved by plea bargains providing for no jail time. In response, Congress included provisions in BCRA to strengthen the fines and penalties, and extended the statute of limitations for criminal prosecutions to 5 years. BCRA §§ 312-15, 2 U.S.C. §§ 437g(d) and 455. Importantly, Congress also directed the U.S. Sentencing Commission to develop guidelines for persons convicted of violating FECA that "reflect the serious nature of such violations and the need for aggressive and appropriate law enforcement to prevent such violations." BCRA, § 314.

TOUGHER FINES AND PENALTIES

Under BCRA, a "knowing and willful" violation of FECA can be a felony. More specifically, knowing violations of the FECA provisions involving the making, receiving or reporting of a contribution, donation or expenditure aggregating \$25,000 or more during a calendar year are punishable by fines and/or up to 5 years of imprisonment. 2 U.S.C. § 437g(d)(1)(A)(i). With one exception, violations involving less than \$25,000 but more than \$2000 are treated as misdemeanors, with the violator facing fines but no more than 1 year of imprisonment. § 437g(d)(1)(A)(ii).

BCRA establishes a special category of offense for "conduit schemes" (violations of 2 U.S.C. § 441f), which involve one person paying another person, typically with impermissible funds, for making a contribution. Violations of the conduit ban involving less than \$25,000 but more than \$10,000 are punishable by up to 2 years of imprisonment. § 437g(d)(1)(D)(i). Violations of the conduit ban involving amounts greater than \$10,000 also are subject to enhanced fines ranging from, at minimum, 300% of the amount involved to as much as \$50,000, or 1000% of the amount involved in the violation, whichever is greater. § 437g(d)(1)(D)(ii).

Perhaps BCRA's most severe impact is the incarceration now likely to result for most convictions. The sentencing guidelines issued pursuant to § 314 of BCRA provide for a base offense level 8 (two levels higher than the base level used for fraud), with enhancements for "specific

offense characteristics" that include: 1) the aggregate amount of the illegal transactions; 2) the number of illegal transactions (increase by two for 30 or more); 3) whether foreign nationals were the source of the illegal funds (increase by two or, in the case of a foreign government, four); 4) the diversion of government funds (federal, state or local), or an intent to obtain a specific, identifiable non-monetary federal benefit (increase by two); and 5) the use of intimidation, threats of pecuniary or other harm, or coercion (increase by four offense levels). Further upward adjustments can be made where the conduct is part of a systemic or pervasive corruption of a governmental function, process or office that may cause loss of public confidence in government. *See* U.S. Sentencing Guidelines Manual (USSM) § 2C1.8 (including Application Notes).

With enhancements, the offense level can quickly lead to a point where incarceration is all but certain. The following DOJ hypothetical is illustrative: A corporate CEO contributing \$50,000 in corporate funds by laundering the contributions illegally through 13 conduits would face incarceration of 15 to 21 months if convicted. US Department of Justice, *Federal Prosecution of Election Offenses* (2003 Supplement, Attachment D). For funds of a foreign corporation, the sentence would range between 21 to 27 months. Even violations involving significantly lesser amounts pose a risk of incarceration. For example, \$5001 brings a two-level enhancement to offense level 10, which calls for 6 to 12 months. Of course, incarceration could take the form of home detention or a halfway house, particularly in cases involving lesser offenses.

The guidelines also establish fines for criminal violations of FECA. *See* USSM § 5E1.2 (minimum and maximum fines for each offense level). For conduit violations involving more than \$10,000, however, the guidelines preserve the court's discretion to impose fines up to the greater of \$50,000 or 1000% of the illegal amount. The guidelines allow for criminal fines to be reduced if a

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violator enters into a conciliation agreement with the FEC, provided that the defendant began negotiations toward the conciliation agreement prior to becoming aware of a criminal investigation. *Id.* (Application Note 5).

OUTLOOK

The severity of the sentencing guidelines surprised the political community, and in reaction, some members of Congress have expressed concern that efforts to deter violations of campaign finance law may have gone too far and will deter political activism. In addition, given that filing of campaign finance and other ethics complaints is now a

regular part of political combat, there is a concern that severe penalties may lead to an increase in the number of criminal prosecutions and possible prosecutorial abuses. Having just lived through an era of zealous independent counsels, this concern resonates with elected officials.

BCRA's severe penalties make it difficult to negotiate conciliation agreements with the FEC. Defense counsel are wary of acknowledging a "knowing and willful" violation, which may subject clients to prosecution. The threat of prison ultimately may impede FEC and DOJ investigations, as defendants refuse to cooperate for fear that their statements could land them in jail.

The revised MOU being developed by DOJ and the FEC will be critical. At minimum, it should restate a general preference for civil enforcement and confirm the FEC's primacy as FECA's enforcement authority. Additionally, the MOU should carefully describe the factors that make a case appropriate for prosecution. This will give defense counsel the ability to make an educated assessment of their clients' criminal liability when negotiating and entering into conciliation agreements.

Finally, BCRA imposes a whole new array of restrictions and requirements that could cause criminal exposure. Many are ambiguous and

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required detailed FEC regulations and advisory opinions. While DOJ officials have continued to emphasize that only "core" violations will be prosecuted, it is unclear which of these new provisions will be viewed as core. For example, one DOJ official recently indicated that violations of BCRA's "soft money" prohibition

could be a new area for criminal investigation. See Justice Officials Give Election Lawyers Mixed Message on BCRA Enforcement, *BNA Money & Politics*, Feb. 2, 2004. While some soft-money violations may be fair game for prosecution, others are legally complicated and should be sorted out in a civil context. The MOU should attempt to spell out in the greatest detail possible those provisions that will be viewed as core

violations and those that are left for civil enforcement.

To date, there have been no criminal prosecutions to show DOJ's post-BCRA enforcement priorities. Until there are prosecutions and the new MOU is issued, lawyers have little guidance for gauging their clients' exposure to criminal prosecution.

