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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | September 2018

FEC Approves Microsoft Proposal to Guard Against Election Interference

By Jan Witold Baran and Eric Wang

As foreign attempts to interfere with American political campaigns persist into this year's elections, technology companies have taken a number of steps to fend against such threats. One prominent example is Microsoft's program to provide election-sensitive users of its products with enhanced online account protections at no additional cost, which the Federal Election Commission (FEC) recently approved.

Microsoft's request for **the FEC advisory opinion (2018-11)** sought to confirm that the company's initiative, called AccountGuard, would not violate the federal law's prohibition against corporations making contributions to federal candidates and national political party committees. Under FEC rules, a contribution is defined to include "the provision of any goods or services without charge

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Wiley Rein Files *Amicus* Brief for U.S. Chamber, Urging Supreme Court to Apply Excessive Fines Clause to States

By Carol A. Laham and Andrew G. Woodson

Wiley Rein LLP submitted an *amicus* brief to the Supreme Court of the United States on behalf of the U.S. Chamber of Commerce, urging the Justices to apply the Eighth Amendment's Excessive Fines Clause to States. In a 2001 decision, the Supreme Court had affirmatively stated that the Excessive Fines Clause applies to the States, although a more recent Supreme Court

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Remaining 2018 Filing Deadlines for Federal PACs

The FEC's reporting deadlines for federal PACs are slightly different in election years and non-election years. In 2018, federal PACs are required to file post-general reports and may be required to file pre-general reports. Federal PAC filing deadlines covering activity for the rest of 2018 are below.

Quarterly Filers

Note that contributions in connection with special or runoff elections may trigger additional reporting requirements for quarterly filers.

Report Type	Close of Books	Due Date
October Quarterly	09/30/18	10/15/18
*Pre-General	10/17/18	10/25/18
Post-General	11/26/18	12/06/18
Year-End 2018	12/31/18	01/31/19

*A PAC that files reports on a quarterly basis must file a pre-general election report covering activity from October 1 through the 20th day before the general election if it makes contributions or expenditures in connection with the general election during that period.

Monthly Filers

Report Type	Close of Books	Due Date
October Monthly	09/30/18	10/20/18
Pre-General	10/17/18	10/25/18
Post-General	11/26/18	12/06/18
Year-End 2018	12/31/18	01/31/19

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Court Protects First Amendment Right of Foreign National Christopher Steele to Distribute Trump Dossier

By Lee E. Goodman

While Special Counsel Robert Mueller, the U.S. Department of Justice, the Federal Election Commission, and Congress contemplate what to do about a host of allegations about foreign-funded political messages in 2016, one court has ruled that Christopher Steele, a British citizen, and his controversial "Steele Dossier" are protected by the First Amendment.

Several Russian-Israeli businessmen are suing Christopher Steele and his United Kingdom-based company Orbis Business Intelligence Ltd. in the Superior Court of the District of Columbia. The businessmen allege that Steele and Orbis defamed them by disseminating false statements about them in the Steele Dossier. Steele allegedly distributed the dossier to reporters in the United States in an effort to inform U.S. citizens about Donald Trump and Russian influence in the months leading up to the 2016 election.

Steele filed a special motion to dismiss the complaint under the District of Columbia's Anti-SLAPP Act ("strategic lawsuits against public participation"). That statute affords special protections against lawsuits "arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502. The Anti-SLAPP Act protects the exercise of First Amendment rights against harassing or punitive litigation that has little merit.

Steele's entitlement to the protection of the D.C. anti-SLAPP statute and First Amendment was challenged because he is a non-resident foreign citizen. But the D.C. Superior Court ruled that the dossier itself is entitled to First Amendment protection regardless of Steele's foreign citizenship. "[A]dvocacy on issues of public interest has the capacity to inform public debate, and thereby furthers the purposes of the First Amendment, regardless of the citizenship or residency of the speaker," the court ruled. "It is now well established that the Constitution protects the right to receive information and ideas…. As a result, the interest of U.S. citizens in receiving information that the First Amendment protects does not depend on whether the speaker is a U.S. citizen or resident."

The court did not stop there. It went on to rule that Steele, a non-resident alien, also is entitled to First Amendment protection because he has "ample connections with the United States that are clearly substantial enough to merit First Amendment protection."

Finally, the court ruled that Steele's dissemination of information about the foreign businessmen is entitled to the First Amendment protection afforded by *New York Times v. Sullivan* because, the court ruled, the businessmen are public figures. Because they are public figures, Steele is protected by the heightened "actual malice" standard of the First Amendment.

Ironically, Congress, in the Federal Election Campaign Act (FECA) and the Foreign Agents Registration Act (FARA), has afforded political speech by foreign nationals less protection than the D.C. Superior Court's ruling. The FECA prohibits foreign nationals from making expenditures to advocate the election or defeat of candidates. The foreign national prohibition has been ruled constitutional by a three-judge U.S. District Court in an

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opinion written by Judge Brett Kavanaugh and summarily affirmed by the Supreme Court. *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011). However, that opinion limited the prohibition to speech expressly advocating the election or defeat of candidates and reserved the right of foreign nationals to engage in issue speech. When foreign nationals or their agents disseminate issue speech in the United States to influence American public opinion, the FARA requires them to register with the Department of Justice and post disclaimers on all materials they distribute.

The Steele Dossier may have implicated both federal statutes, because it discussed a presidential candidate, was distributed for the purpose of influencing the election, and it also discussed policy issues. How Special Counsel Mueller and other government agencies and Congress will reconcile legal treatment of Russian-sponsored ads on Facebook and the Steele Dossier remains to be seen. One possible distinction is that Steele may have been working for the Democratic National Committee and Clinton Campaign when he disseminated the dossier, arguably rendering him an agent of Americans and the Steele Dossier speech by Americans, rather than speech by a foreign national.

The case is *German Khan, et al. v. Orbis Business Intelligence Limited and Christopher Steele*, Case No. 2018 CA 002667 B (Superior Court of the District of Columbia). The ruling granting Steele's special motion to dismiss under the Anti-SLAPP Act was issued by Judge Anthony C. Epstein on August 20, 2018. Lawyers for the foreign businessmen have stated in press reports that they plan to appeal the ruling. ■

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or at a charge that is less than the usual and normal charge."

Microsoft's AccountGuard program will provide federal, state, and local candidates; national and state political party committees; campaign technology vendors; and think tanks and democracy advocacy nonprofits that are customers of Microsoft's ubiquitous O365 products (as well as certain users of Outlook.com and Hotmail.com affiliated with such entities) with a package of additional account security tools at no extra cost and on a nonpartisan basis. Those tools would include cybersecurity training tailored to campaigns to guard against account breaches, notifications from Microsoft's threat intelligence division of hacking attempts by foreign governmental entities directed against particular election-sensitive users, and technical support for securing users' online accounts and addressing security breaches.

Under the general prohibition against corporate contributions, the FEC has concluded, for example, that CompuServe, a provider of dial-up Internet service in the 1990s, was prohibited from providing its service for free to federal candidates, even where the company argued that its purpose for doing so was to generate public goodwill. Similarly, the FEC has concluded that an automobile distributor was prohibited from donating a car for a PAC's fundraising raffle, notwithstanding the promotional value the distributor would receive from the donation.

On the other hand, the FEC has concluded that commercial vendors may provide preferential pricing to federal candidates and political committees and national party committees where their reason for doing so is based on "business considerations" and not "political considerations." Moreover, the FEC has permitted vendors to provide goods or services at no extra charge or at a discount to candidates, political committees, and party committees in the context of a preexisting business relationship, and where the offerings are consistent with a vendor's ordinary course of business.

Microsoft's FEC advisory opinion request cited the company's ordinary business practice of tailoring product packages and pricing to particular customer segments and offering free cybersecurity workshops, both of which are similar to elements of Microsoft's AccountGuard program. In addition, Microsoft explained its business considerations for offering the program to election-sensitive customers, such as maintaining its market share among such customers, protecting its brand reputation by preventing its products from being misused in connection with election interference schemes, and obtaining valuable threat intelligence from participating election-sensitive customers that Microsoft could use to bolster the security of its products for all of its customers. Moreover, Microsoft would only be providing the AccountGuard features to election-sensitive customers of its products – i.e., entities with which Microsoft has a preexisting business relationship.

Based on these considerations, the FEC agreed that Microsoft would not be making prohibited in-kind corporate contributions by offering its AccountGuard program available at no additional charge to federal candidates and national party committees. Wiley Rein's Election Law Practice represented Microsoft in seeking the FEC advisory opinion. ■

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Wyoming Robocall Ban Ruled Unconstitutional

By D. Mark Renaud and Sarah Hansen

On August 6, 2018, federal Judge Alan Johnson ruled that a Wyoming state law banning the use of automated phone calls, or robocalls, by political operatives was unconstitutional. In his decision, Judge Johnson found that the state's complete ban on robocalling was "over inclusive" because it "completely prohibits political speech through robocalls while allowing commercial speech under certain circumstances."

The initial challenge, filed by Michigan-based polling firm Victory Processing LLC, argued that the ban violated its rights under the First and Fourteenth Amendments, especially in light of the ban's impact on political speech. Wyoming Attorney General Peter Michael argued that the law's repeal would violate residents' privacy.

Judge Johnson found that Wyoming's ban targeted political, campaign-related speech and thus was not content-neutral. While the decision acknowledged the importance of state citizens' right to personal privacy, Judge Johnson concluded that privacy was a "substantial interest," rather than a "compelling interest." As such, Wyoming's ban was a content-based restriction with only a "substantial interest" of privacy. Accordingly, the ban did not pass strict scrutiny standards.

Judge Johnson concluded that even if privacy was viewed as a "compelling interest," the construction of Wyoming's law was still overly restrictive. Judge Johnson noted the ban specifically placed political speech at a disadvantage vis-à-vis commercial calls. For example, in Wyoming, commercial sales calls are permitted provided the recipient initiated the call, the number is not on the national Do-Not-Call list, or the caller has an established relationship with the recipient. These exceptions were not present for political-related calls. Judge Johnson reasoned that the Wyoming law was thus squarely unconstitutional for imposing a content-based restriction on political speech that both did not advance a compelling state interest and was not narrowly tailored to serve such an interest.

Judge Johnson distinguished a Montana case in which a robocall ban was recently upheld as constitutional. In that case, a federal district court judge in Montana held that the law's repeal would be a violation of residents' privacy. That judge reasoned that the ban did not violate private companies' Frist Amendment rights because calls could still be made if introduced by a human operator, and thus the law was not an outright ban on political speech. Judge Johnson distinguished the Montana decision on this ground, noting that the Wyoming law did not "allow for any type of politically related robocall."

This decision underscores the conflicting outcomes reached in cases involving robocall laws, especially as such cases become more frequent across the country. Indeed, this Wyoming decision was appealed on September 6, and it remains to be seen how the decision will hold up in subsequent legal proceedings. A complicated, continuously shifting web of state and federal regulations surrounds the practice of robocalling – the disentangling of which requires legal expertise and experience. ■

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Lobbyist Pleads Guilty to Failing to Register as a Foreign Agent for Ukraine

By Daniel B. Pickard and Tessa Capeloto

Following closely behind a string of recent enforcement actions under the Foreign Agents Registration Act (FARA), on August 31, 2018, Samuel Patten, a former associate of Paul Manafort and prominent Washington, DC lobbyist, pleaded guilty for failing to register as a foreign agent under FARA and other counts, including causing and concealing foreign payments.

Mr. Patten's plea and cooperation agreement stipulates that starting around 2014, he formed a lobbying and political consulting services company in the United States, which was retained to advise the Opposition Bloc (a Ukrainian political party) and members of that party, including a prominent Ukraine oligarch who had funded the party. Among other activities, the company performed political consulting services in the United States on behalf of its Ukrainian clients, including contacting members of the U.S. Legislative and Executive branches, as well as the media. The lobbying activity was undertaken to promote the interests of the Ukrainian oligarch and to influence U.S. public opinion. Mr. Patten also assisted the Ukrainian oligarch in drafting op-eds targeting the U.S. press, without disclosing that he was acting as an agent of the Opposition Bloc.

Notwithstanding the fact that Mr. Patten acknowledged engaging in one or more FARA registerable activities, including political activities, within the United States, and although aware that these activities triggered a registration obligation under FARA, Mr. Patten chose not to register under the statute. In addition to FARA violations, Mr. Patten also pleaded guilty to assisting the Ukrainian oligarch with illegally purchasing tickets to President Trump's inauguration. Mr. Patten now faces up to five years in prison and a fine of up to $250,000. A sentencing date has yet to be set.

Mr. Patten's prosecution is yet another example of the U.S. Department of Justice's increasing focus on FARA enforcement. In 2017, Paul Manafort and Richard Gates were charged with knowingly and willfully violating FARA by failing to register as foreign agents of the government of Ukraine, the Ukrainian Party of Regions, former Ukrainian President Viktor Yanukovych, and the Opposition Bloc. Shortly thereafter, in May 2018, Nisar Ahmed Chaudhry, a U.S. permanent resident and Pakistani national, pleaded guilty to charges that he failed to register as a foreign agent in connection with lobbying work he did for the Pakistani government to shape U.S. foreign policy from 2012 through 2018.

These recent prosecutions reinforce the importance of ensuring compliance with the statute – from registering as a foreign agent within the 10-day window for doing so to timely filing and labeling all informational materials that are disseminated to two or more persons. Indeed, foreign agents who intentionally and willfully violate any provision of the statute may be subject to significant criminal and/or civil penalties, including fines up to $10,000 and imprisonment for up to five years. Foreign agents who willfully make false statements or intentionally fail to provide material information in support of their registration or supplemental statements are also subject to these penalties. ■

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Updated Foreign Agents Registration Act (FARA) Handbook

Wiley Rein has updated our FARA Handbook, which reviews the laws and regulations that govern whether an entity should register with the FARA Registration Unit of the U.S. Department of Justice (DOJ), the registration process, the obligations of registered agents, and the penalties that may be imposed for FARA violations. Any person who engages in one or more covered activities under the statute on behalf of a foreign principal is required to register under FARA unless an exemption to registration applies.

Wiley Rein's **International Trade Practice**, recognized by *Chambers USA* as one of the country's elite international trade practices, regularly advises sophisticated industry clients on **FARA matters**. In addition to providing high-level legal analysis of potential FARA issues, our attorneys provide step-by-step assistance with the registration process, as well as assist clients in navigating DOJ audits. Ongoing counseling from our attorneys ensures that our clients remain in compliance with FARA regulations in a dynamic, international marketplace.

The updated FARA Handbook can be read **here**.

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National Defense Authorization Act for Fiscal Year 2019 Includes Numerous Acquisition Reforms That Could Result in Significant Changes to Federal Procurement Procedures

By Tracye Winfrey Howard and Kendra P. Norwood

WHAT: President Trump signed into law H.R. 5515, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019. The NDAA sets federal funding levels and outlines the spending and policy priorities for the U.S. Department of Defense (DOD). The FY 2019 NDAA authorizes base-level funding of $639.1 billion for DOD for the upcoming fiscal year. Congress must still appropriate funds for DOD and all other federal agencies before the start of the new fiscal year on October 1, 2018. In addition to acquisition reforms, the policy provisions in the NDAA also enact significant changes regarding **cybersecurity**, **foreign ownership of U.S. companies**, and export control and international trade issues.

WHEN: The NDAA was signed into law on August 13, 2018. Most of the government contracts provisions require DOD to issue implementing regulations, although some provisions are effective immediately or on another date established by Congress.

WHAT DOES IT MEAN FOR INDUSTRY: There are several provisions in the FY 2019 NDAA that will directly affect contractors. These acquisition reforms include placing additional limits on sole-source and lowest price technically acceptable contracting, revising the definitions of "commercial item" products and services, requiring additional justifications and approvals for exercising multi-year contract authority or withholding consent to subcontract, directing full and open competition for the forthcoming GSA e-Commerce Portal, and providing exceptions for price competition on indefinite-delivery indefinite-quantity contracts in order to push competition to the task order level. Several of these changes were recommended by the "Section 809 Panel" on DOD acquisition reform that was established by the FY 2016 NDAA. Additionally, DOD will be required to submit reports to Congress on high-profile issues such as "second bite at the apple" bid protests filed at both the U.S. Government Accountability Office and the U.S. Court of Federal Claims, the use of Other Transaction Authority, and a mandated pilot program to accelerate contracting and pricing processes. Our further analysis of specific NDAA sections and their potential impacts on government contractors can be found in our September 2018 *Government Contracts Issue Update* newsletter. ■

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decision has called into question this earlier ruling.

The brief was filed in support of the petitioner in *Timbs v. Indiana*. Wiley Rein partners Bert W. Rein, Carol A. Laham, and Andrew G. Woodson co-authored the brief with Daryl Joseffer and Michael B. Schon of the U.S. Chamber Litigation Center.

The case stems from the state of Indiana's 2013 seizure of a $40,000 vehicle after its owner, Tyson Timbs, pleaded guilty to a drug charge. Mr. Timbs had purchased the vehicle with life insurance funds prior to his arrest. In suing the state, he argued that the $40,000 property forfeiture violated the Eighth Amendment's ban on excessive fines, because the maximum state fine was $10,000 for Mr. Timbs' underlying offense. A state appeals court ruled in Mr. Timbs' favor, but the Indiana Supreme Court reversed that decision.

The Chamber's *amicus* brief noted that "the disproportionate and punitive forfeiture" in Mr. Timbs' case "is hardly unique." States and localities across the country are increasingly levying excessive fines on businesses as well as individuals, according to the brief. In particular, the brief provides a number of examples illustrating how state governments are increasingly turning to higher fines and forfeitures from businesses over minor violations to help fund their budgets.

"Today the imperative for incorporating the Excessive Fines Clause against the States could scarcely be clearer," the brief's authors said. "With excessive fines on the rise, and the burdens on business and individuals growing, this case presents the Court with an opportunity to conclusively resolve the incorporation question and protect all Americans' fundamental right to liberty."

To read the *amicus* brief filed by Wiley Rein on behalf of the U.S. Chamber, click **here**. ■

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Events & Speeches

Corporate Lobbying, Gift and Campaign Finance Compliance

George Washington University Graduate School of Political Management

Caleb P. Burns, Speaker

September 19, 2018 | Washington, DC

Campaign Finance 101

Lee E. Goodman, Speaker

MLRC Media Law Conference 2018

September 27, 2018 | Reston, VA

Foreign Agents Registration Act (FARA): Navigating Audits and Other Compliance Issues in a New Era of Enforcement

Daniel B. Pickard, Speaker

Tessa Capeloto, Speaker

Wiley Rein Webinar

October 2, 2018 | Webcast

Corporate Political Activities 2018: Complying with Campaign Finance, Lobbying and Ethics Laws

Jan Witold Baran, Co-Chair

Caleb P. Burns, Speaker

Practising Law Institute

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