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Setting up and Operating a Federal Super PAC

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This memorandum summarizes the rules of the road for setting up and operating federal Super PACs, which are groups formed primarily to make “independent expenditures” in connection with federal elections, and which register and file reports with the Federal Election Commission (FEC). An “independent expenditure” is an expenditure for a communication expressly advocating the success or defeat of a clearly identified candidate for federal office. Unlike traditional federal PACs, a Super PAC may accept unlimited contributions from corporations and unions, and unlimited amounts from individual contributors, as long as they are U.S. citizens or green card holders.

A Super PAC may not be used, however, to make contributions to federal candidates, political party committees, or to PACs that contribute to candidates and party committees. A Super PAC’s activities must also not be coordinated with a candidate, a candidate’s authorized committee, a political party committee, or their respective agents.

Many states allow a federal Super PAC to make expenditures in connection with non-federal elections, although some impose registration and/or reporting requirements. Some states require a separate in-state Super PAC to be created. A handful of states have continued to fight the use of Super PACs, but courts have almost uniformly struck down those laws.

Super PACs can do virtually anything to independently support or oppose candidates. Often they air advertisements on radio and television, but they may also create websites, use social media, and can even develop a ground game to identify voters and get out the vote.

STEPS To SETTING UP A SUPER PAC

Select a name. The Super PAC’s name must appear in public filings and in most public communications in the form of a “paid for by” statement. At a minimum, some initial screening should be done to determine the likelihood of trademark challenges to the PAC’s name, logo, and slogans.

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Determine governance structure. While not required, we recommend that Super PACs incorporate for liability purposes. Donors also often like to see the PAC run by a board with fiduciary obligations responsible for determining how the money will be spent, rather than a hired political consultant who may have a strong incentive to spend money in a way that is beneficial to the consultant. As an incorporated entity, the Super PAC will need articles of incorporation, bylaws, and organizing resolutions. The Super PAC will also need to designate a registered agent to accept service of process.

Open a bank account. The Super PAC must open a bank account in its own name, through which all receipts and disbursements should be made. To open the account, the Super PAC will need an Employer Identification Number (EIN) from the Internal Revenue Service.

Select a treasurer. The Super PAC must appoint a treasurer who is legally responsible for safeguarding PAC funds and ensuring that the PAC files timely and accurate reports. A PAC may not receive or disburse funds if there is a treasurer vacancy. The FEC therefore encourages PACs to appoint an assistant treasurer who may act in the treasurer's absence.

Prepare and file initial registration with the FEC. The Super PAC must register with the FEC by filing a Statement of Organization (FEC Form 1). The FEC Form 1 must be filed within 10 days of receiving contributions or making expenditures in connection with a federal election. The registration form requires the PAC to identify its name, address, committee type, custodian of records, treasurer and any assistant treasurer, and the name and address of the PAC's bank. The FEC Form 1 must also be accompanied by a brief letter specifying the PAC's intention to act as an independent expenditure-only committee.

FUNDRAISING

A federal Super PAC may accept contributions in unlimited sums from individuals (U.S. citizens or green card holders) and other groups or business entities, including corporations and unions. However, federal political committees, including Super PACs, are prohibited from accepting contributions from foreign nationals and federal government contractors.

COORDINATION

Super PACs may not make expenditures at the request or suggestion of a candidate, campaign, or political party, or use non-public information obtained from a candidate, campaign, or political party in connection with media strategy, development, or production. Likewise, a Super PAC may not republish campaign materials prepared by a candidate, campaign committee, or political party, except for a brief quote to illustrate a candidate's position or certain other limited purposes. The coordination ban also applies to interactions with agents of the candidate and campaign finance entity of a candidate, such as common vendors and employees (present and former).

Coordination may cause the Super PAC's disbursement to be considered an illegal, in-kind contribution. Such activity can lead to

intrusive investigations, significant penalties, and even criminal prosecution. To minimize these risks, every Super PAC should adopt and implement a coordination policy, provide training regarding the policy to its employees and vendors, and exercise care in its interactions with candidates, campaigns, and political parties.

ADVERTISING DISCLAIMERS

Public communications by Super PACs must include “paid for by” disclaimers in compliance with FEC rules. The specific disclaimer requirements vary considerably, depending on the communication medium. Any automated phone calls must also comply with sponsorship identification and other restrictions promulgated by the Federal Communications Commission, and may also be subject to state law requirements.

REPORTING

Super PACs are subject to the same reporting obligations as traditional federal PACs. During an election year, the Super PAC must file reports with the FEC disclosing all receipts and disbursements on either a monthly or quarterly schedule. Quarterly filers must also file pre-primary reports 12 days before every primary in which the PAC is active. Super PACs must also file 24- or 48-hour reports disclosing certain expenditures made just before an election. Given the short turnaround time for these reports, it is important to have good accounting systems in place to make certain that the reports are accurate and filed on time.

Federally registered Super PACs are automatically tax-exempt under Section 527 of the Internal Revenue Code, and generally have no filing obligations with the Internal Revenue Service. However, a Super PAC must file Form 1120-POL with the IRS and pay any associated tax for any year in which the organization has investment or similar taxable income over \$100.

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