Updates
July 21, 2021
New Rules Regarding Repayment of Candidate Loans

Last month, a three-judge federal district court struck down as unconstitutional a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), which limited the amount of money a candidate's authorized committee could raise after an election to repay personal loans made by the candidate with respect to that same election.[1] Before this ruling, candidates who made or guaranteed personal loans to their campaigns were prohibited from raising more than $250,000 to retire that debt after the date of the election for which the debt was incurred. The Federal Election Commission (FEC) has appealed this decision to the U.S. Supreme Court, but, as of now, has not sought to stay the decision while the appeal is pending.[2] Unless the Supreme Court overturns this decision, there will be no limit on the amount of money a campaign may raise after an election to repay a candidate's personal loans to the campaign.

The lawsuit, brought by Senator Ted Cruz and his 2018 campaign committee, challenged Section 304 of BCRA, which provided that a candidate who incurred personal loans in connection with the candidate's campaign could not repay more than $250,000 of personal loans made with respect to an election using contributions made to the campaign after the date of that election.[3] Under FEC rules, personal loans, including loans from a third party that were endorsed or guaranteed by the candidate or secured by the candidate's personal funds, could be repaid in full using contributions that were made to the committee *on or before the day of the election*, so long as any amount over $250,000 was repaid within 20 days of the election.[4] After the 20-day period expired, the campaign was required to treat the amounts of any outstanding personal loans exceeding $250,000 (minus any amounts paid off using cash on hand as of the day after the election) as a contribution from the candidate to the committee.[5] The campaign could repay up to $250,000 of the personal loan using contributions made to the campaign *after the date of the election*.[6]

The court held that the limitation on the repayment of personal loans burdened candidates' First Amendment interests in making expenditures to support their campaigns, restricting political expression and association for candidates and their contributors. The FEC argued that the limitation served a compelling government interest because there is a heightened risk and appearance of quid pro quo corruption when campaigns may raise funds to retire debts owed personally to a candidate after the candidate was elected to and holds federal office.[7] The court disagreed, finding that there was not sufficient evidence that post-election contributions to retire personal debts to a candidate presented a heightened risk of quid pro quo corruption.[8] The court also found that the challenged law was not sufficiently tailored to prevent corruption, because it limits loan repayment for both winning and losing candidates, and because the $250,000 cap arbitrarily permitted post-election loan repayment of contributions up to, but not beyond, the cap.[9]

If the ruling stands, campaigns may raise an unlimited amount in contributions to repay a candidate's personal loans both before and after the election. In any case, funds raised after the election to repay outstanding campaign debt must be raised under the contribution limits that apply to the election in connection with which the debt was incurred. For example, a donor that gave $1,000 for a candidate's primary election would be able to give an additional $1,900 toward an outstanding primary loan debt after the primary. However, the donor would have to designate the contribution for debt retirement. A donor who had already given the limit for the primary election would not be able to give any more funds for debt retirement for that same election.

The court did not indicate how the ruling, if it stands, would affect candidates who have already written off personal loans in excess of $250,000 in order to comply with the now-invalidated law. Any candidates who wish to raise funds to retire personal debts incurred for past election cycles should consult with counsel.

Endnotes

[1] *Ted Cruz for Senate v. Federal Election Comm'n*, No. 1:19-CV-00908, 2021 WL 2269415 (D.D.C. June 3, 2021).

[2] Notice of Appeal, *Ted Cruz for Senate v. Federal Election Comm'n*, No. 1:19-CV-00908, 2021 WL 2269415 (D.D.C. June 13, 2021).

[3] 52 U.S.C.A. § 30115(j).

[4] 11 C.F.R. § 116.11(b)(1), (c)(1).

[5] *Id.* § 116.11(c)(2).

[6] *Id.* § 116.11(b)(3), (c)(2).

[7] *Ted Cruz for Senate v. Federal Election Comm'n*, No. 1:19-CV-00908, 2021 WL 2269415 17 (D.D.C. June 3, 2021).

[8] *Id.* at 24.

[9] *Id.* at 26.

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