

FEC Round-Up: FEC Takes Action in Three Matters

November 2011

The Federal Election Commission (FEC) recently made three significant decisions involving permissible separate segregated fund activities, the date that certain independent expenditures are publicly disseminated for reporting purposes and a new step in the latter stages of FEC enforcement matters. Each of these developments is summarized below.

Utah Bankers Advisory Opinion. On September 22, 2011, the FEC adopted Advisory Opinion 2011-14. In the opinion, the FEC considered whether the Utah Bankers Association and its separate segregated fund, the Utah Bankers Association Action PAC (UBAAPAC), may jointly undertake a project called "Friends of Traditional Banking" whereby members of the general public would be solicited via email and a website to make contributions to selected, recommended federal candidates (the Project). As part of the Project, people receiving these solicitations would be encouraged to forward the email to other individuals. While encouraging contributions to certain candidates, the Project would not accept or forward contributions to candidates. Also, the solicitations would not seek contributions to UBAAPAC.

In the advisory opinion, the FEC answered several questions and provided the following answers:

- The FEC concluded that because the proposed email and website solicitations would not be "coordinated communications," the solicitations would not be prohibited in-kind contributions to the federal candidates.
- The FEC permitted UBAAPAC to pay the communications costs of the email and website solicitations while allowing the Utah

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Bankers Association to pay the administrative expenses.

- The FEC held that the value of volunteers' time assisting the Project would not be a contribution to UBAAPAC.
- The FEC stated that these individual volunteers sending Project email solicitations to their friends would not constitute a contribution to UBAAPAC.
- In reviewing the proposed disclaimer, the FEC noted that the disclaimer must include the person paying for the communication as well as the permanent street address, telephone number or web address of that person.

The FEC did not answer other questions raised in the advisory opinion request since it was unable to gather four affirmative votes.

Interpretive Rule - "Publicly Disseminated." After noting the difficulties inherent in determining when some forms of independent expenditures are publicly disseminated, the FEC recently adopted an interpretive rule to provide guidance to speakers. Specifically, the new rule, which was effective on October 4, 2011, elaborates on the meaning of "publicly disseminated" in the context of yard signs, mini-billboards, handbills, T-shirts, hats or buttons.

The FEC concluded that a filer may report such independent expenditure communications on any reasonable date between the time the filer receives or has control over the items through the date the communications are actually disseminated to the public. The FEC offered several examples of acceptable dates, including: the date the filer receives delivery, the date the filer distributes a communication for later dissemination, the date the filer authorizes the display of the communication, or the date of actual dissemination.

Importantly, the date used must not be after the date of actual public dissemination or after the date of the election to which the communication relates.

Additional Enforcement Procedures. The FEC added a new procedure that may allow a respondent to submit an additional brief in the latter stages of an enforcement matter. Under current policy, after the FEC determines there is reason to believe a violation has occurred, the FEC's Office of General Counsel (OGC) must make a written submission, accompanied by a brief (the Probable Cause Brief), recommending whether to find probable cause to believe a violation occurred or is about to occur. The Probable Cause Brief must be submitted to each respondent.

A respondent may file a reply brief within 15 days of receiving the Probable Cause Brief and may request a probable cause hearing. After receipt of the brief and any probable cause hearing the FEC grants the respondent, the OGC must provide written notice to the six FEC Commissioners (OGC Notice) explaining whether it intends to proceed with the recommendation or to withdraw the recommendation.

The new FEC guidance - which became effective on October 28, 2011 - requires that the OGC Notice also be provided to the respondent at the same time it is provided to the commissioners. Further, if the OGC Notice contains new facts or new legal arguments, then the respondent may petition the FEC, within five business

days of receipt of the OGC Notice, to respond in writing to these new facts or arguments. If the FEC approves the request, the respondent may file a Supplemental Brief within 10 calendar days.