

FEC Advisory Opinion Corner

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The Federal Election Commission (FEC) ended 2011 with a flurry of activity, issuing three important advisory opinions and failing to reach a decision on a fourth, controversial advisory opinion.

Advisory Opinion 2011-19 (GivingSphere)

A for-profit corporation developed an Internet and mobile-based processing platform that allows consumers to earn cash rebates on purchases at participating retailers, which in turn may be donated to a variety of participating nonprofit organizations. The requestor asked the FEC whether it may include all active federal political committees in this program.

More specifically, the requestor asked whether it (1) may transmit participating consumers' cash rebates to federal political committees; (2) may provide consumers with a searchable database of all active political committees registered with the FEC; (3) may provide consumers with additional information on federal political committees; (4) may sell advertising space to federal political committees; and (5) may permit federal political committees to post a "badge" on their websites, which would re-direct viewers to the platform's website.

The FEC unanimously decided that this type of affinity program was permissible and would not result in a corporate contribution because (1) the rebate would be offered to all consumers in the ordinary course of business and (2) the rebate would be the property of the individual consumer who ultimately controls the funds, rather than the property of the corporation. As such, the corporation may engage in the five proposed activities outlined above.

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Advisory Opinion 2011-21 (Constitutional Conservatives Fund PAC)

In light of the *Carey v. FEC* litigation and the FEC's recent statement permitting nonconnected political action committees (PACs) to establish "non-contribution" accounts, a federal officeholder's leadership PAC (a type of nonconnected PAC) asked whether it was permitted to establish a non-contribution account and accept unlimited individual and corporate contributions for the purpose of financing independent expenditures.

Carey v. FEC, which was decided in August 2011, effectively mandated that the FEC permit nonconnected PACs to accept unlimited contributions from corporations and labor organizations for the sole purpose of making independent expenditures in connection with federal elections, on the condition that the funds be maintained in a separate bank account. For more information on *Carey v. FEC* and non-contribution accounts, please see the November 2011 "FEC Issues Guidance for PACs Seeking to Make Independent Expenditures" article in Wiley Rein's *Election Law News*.

The FEC unanimously decided that the federal officeholder's leadership PAC could not accept unlimited individual and corporate contributions for the purpose of financing independent expenditures because the Bipartisan Campaign Reform Act of 2002 prohibits federal candidates and officeholders, their agents and entities directly or indirectly established, financed, maintained or controlled by, or acting on behalf of the federal candidates and officeholders from soliciting, receiving, directing, transferring or spending funds that do not comply with federal source prohibitions and contribution limits. By definition, a leadership PAC is a nonconnected PAC directly or indirectly established, financed, maintained or controlled by a federal candidate or officeholder.

Advisory Opinion 2011-22 (Virginia Poultry Growers Cooperative, Inc.)

In this advisory opinion, the FEC unanimously concluded that an incorporated agricultural cooperative with both incorporated and unincorporated members qualified as a membership organization and, therefore, may establish a separate segregated fund (SSF). The FEC further concluded that although the membership organization may solicit and collect contributions for the SSF from its unincorporated members, the membership organization may not solicit and collect contributions from the executive and administrative personnel of its incorporated members.

Advisory Opinion 2011-23 (American Crossroads)

A Super PAC, or independent expenditure-only committee, asked the FEC whether it may finance, produce and distribute issue-oriented television and radio advertisements featuring federal candidates who were materially involved in the creation and production of the advertisements, provided that the advertisements did not satisfy the content prong of the FEC's three-part coordinated communications test.

Super PACs are permitted to accept and spend unlimited individual and corporate contributions for independent expenditures only and are prohibited from making direct or in-kind contributions to other federal committees. All Super PAC communications must adhere to the FEC's strict coordination regulations in order to be considered independent; coordinated communications result in prohibited in-kind contributions.

The requestor hypothesized that it was possible to pass the content prong of the FEC's three-part coordinated communications test if the proposed television and radio advertisements (1) would not be broadcast during any of the applicable electioneering communication timeframes; (2) would not contain express advocacy; (3) would not disseminate, distribute or republish campaign materials; and (4) would not be disseminated in the featured candidate's jurisdiction within 90 days of the candidate's primary or general elections.

In the end, the FEC was unable to reach a decision and failed to issue an advisory opinion. The Democratic commissioners reasoned that the proposed television and radio advertisements would be prohibited in-kind contributions to the featured candidate. These three commissioners stated that although the proposed advertisements did not violate the FEC's three-part coordinated communications test, they would violate a separate statutory provision that deemed all expenditures made in cooperation, consultation or concert with, or at the request of a candidate to be coordinated and in-kind contributions. The Republican commissioners disagreed, relying on a 2003 Explanation and Justification for the coordination regulations, which stated that the separate statutory provision was only applicable to expenditures that are not made for communications. Consequently, the Republican commissioners reasoned that the proposed advertisements were permissible because they would not contravene the three-part coordinated communications test.