

FEC Advisory Opinion Corner -- Four Important Opinions

March 2012

The Federal Election Commission (FEC) began the year by issuing four advisory opinions covering a wide range of topics. One advisory opinion—related to corporate expenditures and Super PACs—did not garner the necessary votes to answer all of the questions. These four opinions are briefly summarized below.

Advisory Opinion 2011-24 (StandLouder.com)

StandLouder.com, a for-profit LLC with a single natural person member, developed a website that allowed its users to submit politically themed (among other) advertisements, some of which would be posted on the website. Once a proposed advertisement was posted to the website, the public would then be able to view the proposed advertisement and financially contribute toward the eventual placement of the advertisement on television, radio, or other media. After sufficient funding was obtained, StandLouder.com would purchase air time and disseminate the advertisement.

StandLouder.com acknowledged that some of the advertisements might be independent expenditures or electioneering communications and asked whether (1) StandLouder.com was a political committee; (2) whether StandLouder.com, along with the advertisement funders, was a political committee or a series of political committees; (3) what reporting and disclaimer requirements would apply to the project; and (4) whether, as an alternative, StandLouder.com could create a Super PAC to conduct and finance its activities related to independent expenditures.

Authors

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

The FEC was unable to reach a decision on the first three questions, but all six commissioners confirmed that StandLouder.com could create a Super PAC for the purpose of accepting advertising content, receiving contributions, and funding independent expenditures.

Advisory Opinion 2011-25 (Atlas Worldwide)

Atlas Worldwide, an air cargo corporation, asked whether certain management employees—chief pilots and directors of training and flight operations administration—were “executive or administrative personnel” and, therefore, members of the corporation's restricted class that could be solicited by the corporation's PAC for political contributions.

The FEC found that the managers were “executive or administrative personnel” and, notably, emphasized that the Fair Labor Standards Act (FLSA) may serve as a guideline when determining whether an employee has the requisite “policymaking, managerial, professional, or supervisory responsibilities” to be considered “executive or administrative personnel.”

A second issue arose, however, because the management employees were former pilots and “inactive” members of a pilots union. As a general matter, FEC regulations exclude from the restricted class professionals who are represented by a labor union. This rule was inapplicable here, however, because the managers did not pay dues, were not entitled to vote, were not covered by a collective bargaining agreement, and were generally not eligible to serve as full-fledged members of the union with the customary rights.

Advisory Opinion 2011-28 (Western Representation PAC)

Western Representation PAC, a non-connected PAC, intended to conduct an independent expenditure campaign using Facebook advertisements in connection with the Republican presidential primary race. The PAC asked whether the independent expenditure for 24- and 48-hour reports required disclosure of the placement costs of the advertisements, provided that the placement costs appeared on the PAC's monthly reports, and whether the monthly reports required attribution of the independent expenditures to the various state presidential primary elections. The FEC answered both questions in the affirmative.

As to the first question, Internet advertising placement fees are typically based on the number of “clicks” an advertisement receives. Thus, there is an inherent uncertainty associated with calculating the advertising costs up front. The FEC noted, however, that Facebook (as well as other companies) charges advertisers at the end of each day, which would allow the PAC to report the placement costs in 24- and 48-hour notices. The FEC also separately observed that it had issued guidance on how to file 24- and 48-hour notices with cost estimates.

Regarding the second issue, the FEC acknowledged that national Internet advertising campaigns in connection with the presidential primary elections present reporting challenges because each state's primary is considered to be a separate election for independent expenditure purposes. The FEC reaffirmed that independent expenditures must be properly attributed to each state's primary election. Although such attribution would require detailed calculations, the FEC noted that it was possible and that committees had

sufficient time to make the calculations between the close of a reporting period and the reporting deadline.

Advisory Opinion 2012-2 (Wawa)

Wawa, a corporation operating a chain of convenience stores, asked whether its area managers and general managers were “executive or administrative personnel” and, therefore, members of the corporation's restricted class. Area managers managed the corporation's operations within a particular geographic area. General managers managed the entire operation at each convenience store.

The FEC found that both types of managers were “executive or administrative personnel” and, as with Advisory Opinion 2011-25 discussed above, underscored that the FLSA may serve as a guideline when determining whether an employee has the requisite “policymaking, managerial, professional, or supervisory responsibilities” to be considered “executive or administrative personnel.”

Despite the FEC's emphasis on the FLSA in Advisory Opinions 2011-25 and 2012-2, it is important to note that there is not a bright-line rule and that restricted class determinations continue to be made on a case-by-case basis.