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ALERT

FEC Allows Federal Officeholders to Establish State PACs

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Recently the Federal Election Commission (FEC) approved an advisory opinion (AO 2023-09) that allows federal officeholders and candidates to establish and operate state PACs that spend funds solely in connection with state and local elections for public office and ballot measures, provided that the state PACs raise only federally permissible funds (contribution amounts of $5,000 or less per year from individual donors) and within applicable state contribution limits (if stricter than the federal limits).

Significantly, the state PACs will **not** share a contribution limit with the federal officeholder's federal leadership PAC or campaign committee. Thus, for purposes of compliance with the Federal Election Campaign Act (FECA), members of Congress may establish and solicit funds for a state PAC that raises individual contributions in amounts of no more than $5,000 (up to state limits) while still maintaining their federal leadership PACs with separate contribution limits of $5,000.

An open question, not answered by the agency today, is whether a federal officeholder would be allowed to establish and solicit federally permissible funds to multiple state PACs in one state or in several states. One could imagine a federal officeholder establishing state PACs in Iowa, New Hampshire, South Carolina, Nevada, and other politically significant states to participate in state elections. The legal reasoning of the advisory opinion does not appear to limit the number of state PACs a federal officeholder could establish and operate, each within the $5,000 per year annual limit.

Authors

Robert L. Walker
Of Counsel, Deputy General Counsel
202.719.7585
rlwalker@wiley.law

Practice Areas

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The FEC's legal counsel opined that federal leadership PACs will not be required to list these state PACs as "affiliated committees" on their FEC registration forms, unless the state PACs engage in joint fundraising activities with the federal PACs.

Although the vote approving the advisory opinion was a 4-2 vote, all six Commissioners agreed with the result. So federal officeholders and candidates may establish state PACs in reliance on a unanimous Commission opinion. The division among Commissioners was based on the technical legal rationale for approving the practice. The majority advisory opinion reasons that a federal officeholder's state PAC, although a "committee" "affiliated" with the officeholder for purposes of applying the EFMC regulations, does not receive "contributions" as defined by the FECA; therefore, it does not share a "contribution" limit with the officeholder's federal PAC. Commissioners Dickerson and Trainor reasoned on a different track that the state PAC is not a "committee" within the meaning of the FECA and therefore is not "affiliated" with the officeholder's federal PAC.

The FEC's advisory opinion, of course, is limited to an interpretation of the FECA. State laws govern state PACs, so state laws must be consulted. Additionally, because the FEC's conclusion is that funds raised by a federal officeholder's state PAC are not "contributions" under the FECA, the opinion may still leave open issues regarding the definitions of "gifts" under the U.S. House and Senate ethics rules. The gift rules of both the House and the Senate include exceptions for acceptance of "contributions," lawfully made, as defined by the FECA. Although the House gift rule also permits acceptance of "a lawful contribution for election to a State or local government office" – and Senate Ethics Committee gift rule guidance has long permitted "Senate Members and employees who become candidates for state or local office [to] accept campaign contributions in accordance with state or local laws" – it would be appropriate for the congressional ethics committees to confirm that the scope of these state/local contribution exceptions include all contributions, for all purposes, made to state PACs established by sitting members of the House or Senate.