

Recent Enforcements: What the FEC is Really Looking For

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Interactions with the FEC

- Enforcement
- Advisory Opinions

Enforcement

- The FEC enforces violations on three distinct tracks:
 - Administrative Fines for basic reporting errors
 - Traditional Enforcement for serious violations
 - Alternative Dispute Resolution for less serious violations or unique matters better suited for negotiation

Administrative Fines

- Reporting violations are like running a stop light.
 - The FEC detects reporting violations when a committee files amended reports, mathematical errors are clear on the face of reports, or the committee files erroneous reports that trigger RFAs and the responses to RFAs reveal reporting mistakes.
 - A formula calculates the civil penalty and staff sends the letter to the political committee explaining the reporting error and demanding the formulaic civil penalty. Over 90% of these are never contested because the reporting errors are usually clear.

Administrative Fines

- You simply fail to report timely
 - Penalties are identified in the regulations

Example – AF 3346 (United State Peanut PAC)

- Mid-Year Report filed more than 30 days late
- Showed \$124,633 in activity
- Penalty calculation of \$6,252

Traditional Enforcement

- Complaints alleging more serious violations and more complicated legal issues can come to the Commission through several routes.
- Most complaints are filed by citizens or political competitors or good government reform organizations.
 - Complaint from Outsider
 - Complaint from Disgruntled Employee
 - Sua Sponte Complaint
- Some complaints are generated inside the Commission, examples include serious legal errors detected by the Reports Analysis Division, referrals after audits are completed,
- Rarely OGC staff spot a violation from news articles or information forwarded by another agency (such as DOJ).

Traditional Enforcement

- Complaints go through a complicated procedure:

- OGC weeds serious vs facially frivolous complaints
- Respondent may file a response
- OGC prepares a report and RTB recommendation to Commission

The Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include, without limitation, an assessment of the following factors;

- (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation;
- (2) the apparent impact the alleged violation may have had on the electoral process;
- (3) the complexity of the legal issues raised in the matter; and
- (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law.

(See General Counsel's Brief in MUR 7394)

Traditional Enforcement

- Commission considers/votes on OGC RTB recommendation
- If Commission votes RTB, it opens an investigation (sometimes these are sent to ADR, see below)
- Either lengthy investigation ensues or Respondent conciliates (settles) quickly
- After investigation, OGC prepares another report and PC recommendation to Commission
- Commission considers/votes on OGC PC recommendation
- If Commission votes PC, it proposes conciliation for at least 30 days
- If no conciliation, Commission votes whether to bring civil enforcement action in Court

Complaint from Outsider

- MUR 7394 (O'Donnell for Congress, et al.)
 - Related, in part, to payment for the use of facilities
 - Companies responded either that they were paid for the use of the facilities or regularly provided the facilities for free
 - Committee refunded others who had not been charged.
- MURs 7078 and 7084 (Scott Taylor for Congress, et al.)
 - Complaint alleged various companies who were government contractors violated the law because their employees contributed to the candidate.
 - Finding – individual employees of government contractors are not themselves government contractors.

Disgruntled Employee

- MUR 7028 (Plumbers & Pipefitters Local Union # 9 and PAC)
 - A disgruntled union member complained that the Union failed to obtain appropriate voluntary authorizations for payroll deductions. Activity over 5 years.
 - Authorizations were oral, or
 - Written authorizations did not include proper notices (voluntary, refuse to contribute without reprisal, political purposes of PAC, guideline language)
 - (Note, the complainant asked for his money back and didn't get it!)
- Penalty = \$96,250 and refund of individual's money (\$1,462.93)

The FEC's *Sua Sponte* Process

Some of the Benefits:

- A 25-75% penalty reduction
- Accelerated timeframes for resolving matters
- The Commission may refrain from making a knowing and willful finding even though the facts could support such a conclusion.
- The Commission has indicated that it will work with parties to protect privileged communications from public disclosure.

The FEC's *Sua Sponte* Process

■ *Investigative and Corrective Actions*

- To the extent practicable, the violation should cease immediately upon discovery
- Corrective action should be taken promptly
- There should be a thorough review of the nature and origins of the problem.
- The public record should be clarified in a timely fashion.
- The organization should make any necessary refunds to contributors and disgorge funds to the U.S. Treasury, as appropriate.
- The respondent should adopt more effective internal controls to prevent a recurrence

The FEC's *Sua Sponte* Process

- The Commission considers whether the steps undertaken were voluntary or done only after a complaint was to be filed.
- The review should be done in a timely fashion.
- The Commission wants to see good faith cooperation and would like relevant records to be made available for its review.

Sua Sponte Submission

- MUR 7410 (Wine and Spirits Wholesaler of America, Inc. (WSWA); and its PAC
 - Impermissibly solicited certain unionized individuals outside of its restricted class for contributions to the Committee
 - 473 unionized employees
 - Contributed \$246,142.69 over 9 yrs, but \$145,306.88 w/i SOL
 - All contributions refunded
 - \$7,000 civil penalty

Sua Sponte Submission

- MUR ?
 - Embezzlement by Treasurer of Cong. Dave Joyce's Campaign
 - Alleged that the treasurer both overreported and underreported in order to hide \$80,000 of ATM withdrawals.
- Lesson
 - FOLLOW the FEC's BEST Practices for Embezzlements

Alternative Dispute Resolution

- Some complaints present legal and factual issues that are straightforward that do not deserve lengthy investigation or legal debate.
- These are often referred to the ADR office for a relatively prompt, negotiated conciliation.

Alternative Dispute Resolution

- ADR 843 (American Financial Services Association PAC) – FEC initiated
 - Misstated receipts by 10,080 and \$67,904 in 2013, and failed to disclose \$310,683 in receipts in 2014
 - Agreed to perform annual internal audit and reconciliation for 2 years, penalty of \$11,000
- ADR 847 (CVS Health PAC) – self initiated
 - Understated Year-End Cash-on Hand by \$9,510.30
 - Dismissed because of low dollar amount
- ADR 860 (Edward Jones PAC) – FEC initiated
 - Disclosed \$130,650 more in receipts on 2015 Year-End Report – but not until Oct. 2016
 - Agreed to participate in a compliance conference and a civil penalty of \$4,000
- ADR 876 (National Association of Insurance and Financial Advisors Political Action Committee) – FEC initiated
 - Filed an amended report (w/l one month) disclosing \$208,089.33 in disbursements
 - Agreed to participate in a compliance conference and a civil penalty of \$3,800

Criminal Enforcement

- There is an additional enforcement track.
 - FEC occasionally refers particularly egregious and serious FECA violations to the DOJ for criminal investigation and enforcement
 - knowing and willful violations are criminal
 - making a false statement

Major/Hot Substantive Issues

- **Reporting Accuracy** – This is most common enforcement subject day in and day out
- Name of Another Contributions – donations to Super PACs passed thru non-profit orgs or other entities
- LLC Contributions to Candidates and Super PACs
 - Corporate vs Partnership LLCs to Candidates
 - “Name of Another” misuse of LLCs to pass contributions to Super PACs
- Non-Profit Independent Expenditures – “Dark Money”
 - IE reporting – timely and accurate
 - Disclosing donors on Form 5 – FEC rule in litigation
 - Political committee status – FEC decisions 3-3 and in litigation

Major/Hot Substantive Issues

- Coordination between political committees and IE spenders
- **Foreign Contributions & Expenditures** – heightened attention at FEC and DOJ on:
 - foreign involvement in companies' political giving decisions
 - suspicious LLCs and whether foreign owners, partners or funders are behind the LLCs
 - certain commissioners are taking a broader definition of “foreign national” to include foreign-owned subs on theory they are necessarily/unavoidably controlled by foreign parent corp and foreign executives
- **Coerced Employee Contributions** – bipartisan concern at FEC
- Personal Use of Campaign Funds

Recent Enforcement Examples (of interest to Trade Assocs. and businesses)

MUR 6920:

- LLC donated to American Conservative Union which contributed to Super PAC – both transactions occurred within an hour, evidencing a pass through contribution, which the Commission unanimously punished as “name of another” violation. \$350,000 civil penalty.

Recent Enforcements

Multiple MURs :

- A series of LLC contributions to Super PACs. Varying fact patterns. Some LLCs were set up overnight for the purpose of making one contribution to a Super PAC. Some LLCs were bona fide. Commission divided 3-3 on proper legal analysis, but all Commissioners believe that a purposeful pass through is a “name of another” violation. Going forward, contributions from LLCs will receive heightened attention.

Recent Enforcements

MUR 6589:

- A non-profit 501c4 organization made significant IEs and ECs in 2012. The Commission divided 3-3 over counting ECs toward “major purpose” test/“political committee” status. Federal court ruled the Commission must count most ECs in addition to IEs.
- The upshot is that every business and trade association should be careful in assuming that contributions to 501c4 orgs that play in elections will be confidential.

Best Practices to Avoid Enforcement

- Review PAC reports carefully and audit against bank records regularly
 - Prior to filing each FEC report, reconcile bank account and accounting records with disclosure reports. Bank records should also be reviewed for unauthorized transactions each month.
 - Reconciliations should be conducted by someone other than a check signer or individual responsible for handling the PAC's daily accounting.
 - The individual monitoring receipts should make a list of all receipts and place a restrictive endorsement on checks.
 - Receipts should be deposited daily.
 - Disbursements should be made with pre-numbered checks.
- Tickler system to keep reports timely
- No pass-through contributions to Super PACs or candidates
- Due diligence on activities of 501c4 orgs

Best Practices to Avoid Enforcement

- Due diligence on LLC contributions/donations
 - Are they bona fide or pass throughs?
 - Any foreign owners or funders behind the LLCs?
- Strict policy against coordinating expenditures with candidate campaigns and political parties (strict policies)
- Strict policy against misuse of corp/trade Assoc resources in support of candidates/parties
- Political activity policies (campaign activity and lobbying and ethics)
- Once-annually training seminars for employees

Advisory Opinions

- What's the First Step to Seeking An Advisory Opinion?
 - Check the Statute for a direct answer to your question
 - Check the regulations for a direct answer to your question.
 - Analyze prior Advisory Opinions to see if any directly apply to your client's situation
- Material differences between your client's situation and prior Advisory Opinions necessitate a request for a new Advisory Opinion.

AOs: Restrictions

- The FEC will not answer hypothetical questions.
- The FEC will not answer questions related to a third party. Requesting parties should include any entity to which request applies. Thus, the request may need to include a representative member of a trade association, for instance.
- The FEC only will answer a question regarding a “specific transaction” or activity that **the requestor** plans to undertake, is undertaking, or intends to undertake in the future.

AOs: Contents of a Request

- What Information Should be Included in an Advisory Opinion Request?
 - The Request must explain all material facts and circumstances and provide relevant supporting documents (e.g., articles of incorporation, bylaws, contracts, lists of members).

Advisory Opinions Related to Corporations & Trade Associations

- Corporation acting as a vendor
- Issues related to affiliation, mergers, or spinoffs

Relevant 2018 Opinions

- **AO 2018-02 Alabama Academy of Radiology and ALRAD PAC**

Conversion of nonfederal committee to joint federal-nonfederal committee.

Relevant 2018 Opinions

- **AO 2018-05 CaringCent, LLC**

Vendor collecting and forwarding contributions to political committees.

Relevant 2018 Opinions

- **AO 2018-11 Microsoft Corporation**

Technology corporation's provision of enhanced security protections to election-sensitive customers at no additional cost would not result in an in-kind contribution because the services were provided based on commercial and not political considerations, and in the ordinary course of business.

Relevant 2018 Opinions

- **AO 2018-14 Oldenburg** (withdrawn)
US Postal Service Contractor status as a federal contractor

Relevant 2017 Opinions

- **AO 2017-01 American Urological Association**
Affiliation status of two membership organizations.
- **AO 2017-03 American Association of Clinical Urologists and UROPAC**
Affiliation status of two membership organizations.
- **AO 2017-06 Stein and Gottlieb**
Vendor collecting and forwarding contributions to political committees.
- **AO 2017-13 National Sorghum Producers and Sorghum PAC**
Checkoff system for contributions to trade association and state affiliates acting as collecting agents.