



Compliance: Message from the Reports Analysis Division (RAD) – Process Change Notification

The Reports Analysis Division (RAD) will fully implement a process change to send Requests for Additional Information (RFAIs) via e-mail on October 28, 2011. RFAIs are sent when an apparent violation or discrepancy is identified on a campaign finance report filed with the FEC and affords an opportunity to correct or clarify the public record. Please note that you will no longer receive paper RFAIs through the mail once this process begins.

To provide an e-mail address or update your current e-mail address, please file an amended Statement of Organization (FEC Form 1).

If you would prefer to continue to receive RFAIs on paper, please file a miscellaneous document (Form 99 for electronic filers), to indicate this preference.

Should you have any questions, please contact your Campaign Finance Analyst on our toll-free number (800) 424-9530 (at the prompt press 5 to reach the Reports Analysis Division) or our local number (202) 694-1130.

(Posted 10/17/2011; By: Debbie Chacona)

Resources:

- [FEC Forms and Instructions](#)
- [Form 99 for Electronic Filers](#)
- [Office of Compliance](#)

Litigation: FEC Statement on *Carey v. FEC*

Reporting Guidance for Political Committees that Maintain a Non-Contribution Account

The Federal Election Commission today announced that, consistent with its agreement to a [stipulated order and consent judgment dated August 19, 2011 in *Carey v. FEC*](#), Civ. No. 11-259-RMC (D. D.C. 2011), it will no longer enforce statutory and regulatory provisions that:

- prohibit nonconnected political committees from accepting contributions from corporations and labor organizations, provided the political committee maintains and deposits those contributions into a "Non-Contribution Account" (described below), or
- limit the amounts permissible sources may contribute to such accounts.⁽¹⁾

In *Carey v. FEC*,⁽²⁾ the National Defense PAC (NDPAC), a nonconnected political committee, sought to solicit and accept unlimited contributions to one bank account for use in making independent expenditures in federal elections, while maintaining a separate bank account subject to the statutory amount limitations and source prohibitions for making contributions to Federal candidates.

On August 19, 2011, the Commission entered into a stipulated order and consent judgment with the plaintiffs agreeing that it would not enforce against plaintiffs the amount limitations in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) of the Federal Election Campaign Act (FECA), as well as any implementing regulations, with regard to contributions received for independent expenditures as long as NDPAC maintains separate bank accounts as described above and allocates its administrative expenses between the accounts in a manner that closely corresponds to the percentage of activity for each account.

The Commission is providing the following guidance to the public on how it intends to proceed consistent with the stipulated order and consent judgment in *Carey*:

The Commission will no longer enforce 2 U.S.C. §§441a(a)(1)(C) and 441a(a)(3), as well as any implementing regulations, against any nonconnected political committee with regard to contributions from individuals, political committees, corporations, and labor organizations, as long as (1) the committee deposits the contributions into a separate bank account for the purpose of financing independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives (the "Non-Contribution Account"), (2) the Non-Contribution Account remains segregated from any accounts that receive source-restricted and amount-limited contributions for the purpose of making contributions to candidates, and (3) each account pays a percentage of administrative expenses that closely corresponds to the percentage of activity for that account.

(1) Foreign nationals, government contractors, national banks and corporations organized by authority of any law of Congress cannot contribute to such separate accounts. 2 U.S.C. §§441b, 441c and 441e.

(2) Materials related to *Carey v. FEC* are located at <http://www.fec.gov/law/litigation/carey.shtml>.

Until such time as the Commission adopts a new regulation, nonconnected political committees that wish to establish a separate Non-Contribution Account consistent with the stipulated judgment in Carey should:

- Notify the Commission of their intent to do so.
 - In the case of political committees already registered with the FEC, the committee should notify their Reports Analysis Division analyst(s) by letter or electronic submission ⁽³⁾ of their intent to establish a separate Non-Contribution Account.
 - In the case of newly registering political committees, include the [notification letter](#) with their Form 1 (Statement of Organization). The notification letter may state the following:

“Consistent with the stipulated judgment in Carey v. FEC, this committee intends to establish a separate bank account to deposit and withdraw funds raised in unlimited amounts from individuals, corporations, labor organizations, and/or other political committees. The funds maintained in this separate account will not be used to make contributions, whether direct, in-kind, or via coordinated communications, or coordinated expenditures, to federal candidates or committees.”
- Report all receipts and disbursements for both accounts pursuant to the Act and Commission regulations. See 2 U.S.C. §434; 11 CFR Part 104.
 - Though these contributions would normally be disclosed on Line 11(a) of Form 3X, there is not, at present, a clear way to distinguish on Line 11(a) between contributions deposited into the committee’s separate accounts. Accordingly, committees should report contributions deposited into the Non-Contribution Account on Line 17 of Form 3X titled “Other Federal Receipts.”
 - When itemizing on Schedule A, electronic filers should identify those receipts by entering “Non-Contribution Account” as memo text ⁽⁴⁾ or in the description field. (Paper filers should simply write “Non-Contribution Account” below the amount.)
- Report all Independent Expenditures paid from the Non-Contribution Account on Line 24 of Form 3X.
 - When itemizing on Schedule E, electronic filers should identify these disbursements by entering “Non-Contribution Account” as memo text or in the description field along with the required purpose of the disbursement. (Paper filers should simply write “Non-Contribution Account” below the amount.
 - Report all other disbursements, including those for administrative or operating expenses made from a committee’s Non-Contribution Account, on Line 29 of Form 3X titled “Other Disbursements” (as opposed to Line 21(b) of Form 3X).
 - When itemizing on Schedule B, electronic filers should identify these disbursements by entering “Non-Contribution Account” as memo text or in the description field along with the required purpose of the disbursement. (Paper filers should simply write “Non-Contribution Account” below the amount.

(3) Form 99 for electronic filers.

(4) This is not to be confused with a “memo entry,” which is used for disclosure purposes only and is not reflected in the cash-on-hand amount.

- Allocate administrative expenses so that each account pays a percentage that closely corresponds to the percentage of activity for that account.

The Commission intends to initiate a rulemaking, and to amend its reporting forms accordingly, to address the Carey opinion and stipulated judgment, as well as related court rulings in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

Political committees with specific questions regarding their reporting obligations may contact the Reports Analysis Division at (800) 424-9350 (at the prompt, press 5). Others may contact the Information Division at (800) 424-9530.

(Posted 10/6/2011; By: FEC Press Office)

Resources:

- [Press Release: Statement of FEC on Carey v. FEC](#)
- [Carey v. FEC: Ongoing Litigation Page](#)
- [Recent Developments in the Law](#)
- [FEC Form 3X and Instructions](#)
- [FEC Rulemakings Search](#)

Regulations: Interpretive Rule on Dissemination Date for Certain Independent Expenditures

On October 4, 2011, the Commission published in the *Federal Register* an Interpretive Rule addressing when independent expenditure communications taking the form of mini-billboards, yard signs, handbills, hats, buttons and similar items are considered "publicly disseminated" for reporting purposes.

The actual public dissemination date of independent expenditures that take the form of signs, handbills, t-shirts, hats, buttons and similar items is difficult to establish in situations where the items are disseminated in stages or where items are purchased from a vendor and then retained for a period of time before being disseminated to affiliate or member organizations, or to individuals such as employees or volunteers to wear or display in public. For this reason, the Commission has clarified a range of acceptable dates that may be used as the public dissemination date for these forms of independent expenditure communications by individuals and organizations required to report independent expenditures ("filers"). See 11 CFR 104.4(b)(2), (c) and (f), and 109.10(c) and (d).

The Commission has determined that filers may report the independent expenditure communications mentioned above as "publicly disseminated" on any "reasonable date" starting with the date the filer receives or exercises control over the items in the usual

and normal course of dissemination, up to the date that the communications are actually disseminated to the public. "Reasonable dates" include, but are not limited to:

- The date that a filer receives delivery of the communication;
- The date that the filer distributes the communication to members or employees for later public dissemination;
- The date the filer distributes the communication to affiliate or member organizations for later public dissemination;
- The date as of which the filer authorizes employees or members to display the communication; or
- The date of actual public dissemination, if that date is known to the filer.

In no event may a filer choose a date that is later than the actual date of dissemination. Likewise, a filer may not choose a date after the date of the election to which the independent expenditure pertains.

Date Effective: October 4, 2011

(Posted 10/6/2011; By: Christopher Berg)

Resources:

- [Federal Register Notice of Interpretive Rule](#)
- [Brochure: Coordinated Communications and Independent Expenditures](#)
- [Policy Statements, Interpretive Rules and Other Guidance](#)

Regulations: Advance Notice of Proposed Rulemaking for Internet Communication Disclaimers

On October 4, 2011, the Commission approved an Advance Notice of Proposed Rulemaking (ANPRM) concerning disclaimers on certain Internet communications. The Commission requests comments from the public, by November 14, 2011, on whether and how it should modify its rules regarding disclaimers on certain communications appearing on the Internet. The Commission does not anticipate that any final rule would become effective for the 2011-2012 election cycle.

Background

Under the Federal Election Campaign Act (the Act), a disclaimer is a statement that must appear on certain communications in order to identify who paid for the communication and, where applicable, whether the communication was authorized by a candidate. With some exceptions, the Act and Commission regulations require disclaimers to accompany public communications that are made by a political committee, expressly advocate the election or defeat of a clearly identified federal candidate or solicit contributions. 2 U.S.C. §441d(a); 11 CFR 110.11(a). Political committees must also include a disclaimer in communications sent via email to more than 500 recipients, as well as their Internet websites.

While the term “public communication” does not usually include Internet communications, it does encompass communications placed for a fee on another person’s website. 11 CFR 100.26. Therefore, such communications are subject to disclaimer requirements as well.

For those communications requiring disclaimers, each disclaimer “must be presented in a clear and conspicuous manner, to give the reader, observer or, listener adequate notice of the identity” of the communication’s sponsor. 11 CFR 110.11(c)(1).

Certain communications are exempt from these general disclaimer requirements, such as bumper stickers, pins, buttons, pens and other small items upon which a disclaimer cannot be conveniently printed, known as the “small items exception.” Disclaimers are not required for other communications such as skywriting, water towers, apparel or other communications of such a nature where inclusion of a disclaimer would be impracticable, known as the “impracticable exception.”

Recent Developments Concerning Internet Ads

The Commission recently considered two advisory opinion requests that sought to exempt certain Internet ads from the disclaimer requirements under the small items or impracticable exceptions. First, Google, Inc. asked the Commission if it could sell text ads consisting of approximately 95 characters to candidates and other political committees without disclaimers. Google proposed that viewers could click on the ad and be directed to a disclaimer on the ad’s landing page. The Commission found that such ads would not violate the Act, but did not agree on the reason for its decision. [AO 2010-19 \(Google\)](#).

In another advisory opinion request, Facebook asked if its small, character-limited ads qualified for the small items or impracticable exceptions to the disclaimer requirements. The Commission could not approve an advisory opinion by the required four affirmative votes, and therefore could not provide an answer to Facebook.

Comments

The Commission seeks comments that address the ways that campaigns, political committees, voters and others are using, or may begin to use, the Internet and other technologies to disseminate and receive campaign and other election-related material. The Commission is interested in comments that address possible modifications of the disclaimer requirements, including technological alternatives. The ANPRM references the California Fair Political Practices Commission’s recent amendments to its regulations regarding disclaimers on electronic media advertisements, which allowed limited size ads to provide a disclaimer via a rollover display, link, or other technological means and asks whether the Commission should consider similar abbreviated disclosure. The Commission welcomes comments on any aspect of the issues addressed in the ANPRM. Given the fast rate of technological development, the Commission also seeks comments that address possible regulatory approaches that could minimize the need for serial revisions of Commission regulations.

All comments must be received in writing on or before November 14, 2011. Comments may be submitted electronically via the Commission’s website at <http://www.fec.gov/fosers>. The public is encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, paper comments may be submitted to Federal Election Commission, Attn: Amy Rothstein, Assistant General Counsel, 999 E Street, NW, Washington, DC, 20463. In order to be considered, all comments must include the full name and postal address of the commenter. The Commission will post the comments on its website at the conclusion of the comment period.

The full text of the ANPRM is available at: <http://sers.nictusa.com/fosers/viewreg.htm?regno=2011-02&docno=97168>.

(Posted 10/14/2011; By: Isaac J. Baker)

Resources:

- [Commission Consideration of ANPRM](#) 
- [Brochure: Special Notices on Political Ads and Solicitations](#)
- [Consideration of AOR 2011-09 \(Facebook\)](#) [PDF]

Compliance: Agency Procedure Following OGC's Submission of Probable Cause Briefs

The Commission has approved a new agency procedure to formalize certain agency practices in the enforcement process. See 2 U.S.C. §437g(a); 11 CFR 111.16.

Under the Federal Election Campaign Act (the Act) and Commission regulations, the Office of General Counsel (OGC) is required to make a written recommendation to the Commission about whether to find probable cause to believe that a violation has occurred or is about to occur. 2 U.S.C. §437g(a)(3); 11 CFR 111.16(a). The OGC recommendation is supported by a Probable Cause Brief, which is provided to each respondent. 11 CFR 111.16 (b). The respondent then may file a Reply Brief within 15 days of receiving OGC's Probable Cause Brief, and may request a Probable Cause Hearing before the Commission. See 11 CFR 111.16. After reviewing the respondent's brief, OGC must advise the Commission in writing as to whether it intends to proceed with its recommendation or to withdraw the recommendation from Commission consideration. 11 CFR 111.16(d).

However, the Act and Commission regulations do not address whether OGC must provide a copy of the written recommendation, or OGC Notice, to the respondent; what information the OGC Notice may contain; and whether the respondent should have an opportunity to reply to the OGC Notice.

Under the new agency procedures, the OGC Notice provided to the Commission will be provided to the respondent at the same time. The OGC Notice may include information that replies to, or argues facts or law in response to, the respondent's Reply Brief, or that arises out of a Probable Cause Hearing. If the OGC Notice contains new facts or new legal arguments raised by OGC and not contained in the Probable Cause Brief, or raised at a Probable Cause Hearing, the respondent may submit a written request to address the new points raised by OGC within five business days of the respondent's receipt of the OGC Notice.

Within five business days of receipt of a written request from a respondent, the Commission may, by four affirmative votes, allow the respondent to address in writing the new points raised by the OGC Notice and will provide the respondent with a date by which the Supplemental Reply Brief must be filed. Any request that is not approved by the Commission within five business days of the Commission's receipt of the request shall be deemed denied without further action by the Commission.

The new procedure takes effect October 28, 2011. The complete notice of this procedure was published in the October 13, 2011, *Federal Register* (76 FR 63570).

(Posted 10/13/2011; By: Zainab Smith)

Resources:

- [Federal Register notice](#) [PDF; 2 pages]
- [Enforcement Matters](#)
- [Notices of Agency Procedure](#)
- [Commission's consideration of notice](#) 

Advisory Opinions: AO 2011-14 SSF Communications to Public

An SSF may make communications to the general public that ask individuals to contribute directly to particular federal candidates.

Background

Utah Bankers Association (UBA) is an incorporated tax-exempt trade association for Utah's commercial banks, savings banks and industrial loan corporations, and is a state affiliate of the American Bankers Association. The Utah Bankers Association Action PAC (UBAAPAC) is the separate segregated fund of UBA.

UBAAPAC intends to solicit the general public by email and through a public website to make contributions directly to federal candidates (the "Project"). The Project will have its own name ("Friends of Traditional Banking"), as well as its own website and email address. UBAAPAC will assemble two councils to lead the Project: one council will identify federal candidates who support policies favorable to traditional banking, and the other council will select a small number of candidates from that list to be included in the Project's communications. The councils will be composed of employees of state bankers associations who will serve on the councils as part of their regular employment responsibilities, as well as uncompensated individuals who are not employed by, but who may be members of, state bankers associations.

The Project will encourage members of the councils to forward the Project's emails to individuals on the members' personal contact lists. It will also encourage email recipients to forward the emails and to refer others to the Project's website. The website and emails will contain a disclaimer stating, in a printed box, that the communications are "Paid for by Friends of Traditional Banking, a project of Utah Bankers Association Action PAC. Not authorized by any candidate or candidate's committee. www.FriendsOfTraditionalBanking.com."

The Project will not accept or forward earmarked contributions to a candidate or a candidate's authorized committee, nor will it solicit contributions to itself or to UBAAPAC, or make contributions to candidates. The Project also intends to conduct its activities independently of federal candidates and political party committees.

UBA will pay the Project's administrative costs, including legal and phone costs, and intends to accept payments from affiliated incorporated state bankers associations to help defray the Project's administrative costs. UBAAPAC will pay for the Project's website and email expenses (including staff time spent creating email and website content, Internet vendor costs and server time). To cover these costs, UBAAPAC may use funds transferred from UBAAPAC's affiliated political committees. The Project plans to cover the costs of forwarding emails for each council member who works at a state bankers association by making an annual advance payment of fifty dollars to that member's association. The Project's disbursements will be reported to the Commission on UBAAPAC's Form 3X.

Analysis

First, the Commission considered whether the Project's proposed website and email communications soliciting contributions to federal candidates would result in in-kind contributions to those candidates.

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations, including incorporated trade associations, from making contributions to candidates or their authorized committees. 2 U.S.C. §441b(a); 11 CFR 114.2(a), (b), (f), and 114.8(b). A payment for a communication to the general public that is coordinated with a federal candidate is an in-kind contribution to the candidate. 2 U.S.C. §441a(a)(7)(B)(i); 11 CFR 109.21(b). Commission regulations provide a three-prong test to determine if a communication is a coordinated communication. 11 CFR 109.21(a). First, the communication must be paid for, in whole or in part, by a person other than the federal candidate, the candidate's authorized committee or the political party committee (the payment prong); second, the communication must satisfy one of the five content standards (the content prong); and third, the communication must satisfy one of the five conduct standards (the conduct prong). 11 CFR 109.21(a), (c) and (d). A communication must satisfy all three prongs to be considered an in-kind contribution. 11 CFR 109.21.

The Commission also considered whether council members could forward the Project's email solicitations to their personal friends and acquaintances without making a contribution to UBAAPAC, and whether the council members could use their corporate employers' computers to forward the emails without causing a prohibited corporate contribution to UBAAPAC.

The term "contribution" does not include individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services. 11 CFR 100.94. Internet activities include sending and forwarding emails. 11 CFR 100.94(b). The Commission has also established a safe harbor which permits corporations to allow their employees to use corporate computer and Internet facilities to engage in voluntary individual Internet activities, as defined in 11 CFR 100.94, without a corporate contribution resulting, provided that the activity does not prevent the employee from completing the normal amount of work for which the employee is paid or is expected to perform, does not increase the corporation's overhead or operating costs and is not coerced. 11 CFR 114.9(a)(2)(ii).

Under these provisions, the Commission concluded that the council members may forward the emails and may use their employers' computer equipment without the activities resulting in contributions to UBAAPAC. With regard to individuals who serve on the councils in their personal capacity as volunteers, the activities would not be considered contributions so long as the council members forward the emails as uncompensated volunteers and as

long as the use of the corporate computers and Internet facilities fall within the safe harbor. State association employees who serve on the councils also may forward the emails. The Commission determined that an advance annual payment by UBAAPAC to each council member's state association to cover costs associated with the member's forwarding of Project email solicitations would not result in facilitation of a contribution if the advance payment is the fair market value of the council member's services. 11 CFR 114.2 (f)(2)(i)(A).

The Commission also noted that the Project's disclaimer language must be revised to comply with the Act and Commission regulations. All "public communications," as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public must include a disclaimer identifying who paid for and, where applicable, who authorized the communication. 11 CFR 110.11(a); see also 2 U.S.C. 441d(a), 431(22). If the communication is not authorized by a candidate (or the candidate's authorized committees or agents), the disclaimer must "clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee." 11 CFR 110.11(b)(3); see also 2 U.S.C. §441d(a)(3).

In this case, UBAAPAC will pay for the Project's email and website communications, but the proposed disclaimer identifies the Project, rather than UBAAPAC, as the payor, and does not provide UBAAPAC's permanent street address, telephone number or website address. Therefore, the disclaimer must be revised to show UBAAPAC as the payor and include UBAAPAC's permanent street address, telephone number or website address. The Commission added that the Project is not required to include disclaimers beyond those required under 11 CFR 110.11 to its email solicitations in anticipation of the emails being forwarded by the intended recipients to other individuals.

Finally, the Commission approved the proposed methods of funding the Project's administrative and communication costs. Although the Act and Commission regulations prohibit a corporation from making contributions in connection with any federal election, the definition of "contribution" does not include expenses paid by a corporation for "the establishment, administration, and solicitation of contributions to" the corporation's SSF. 2 U.S.C. §441b(a) and (b)(2)(C); 11 CFR 114.2(a). These establishment, administration and solicitation costs are "the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, fundraising and other expenses incurred in setting up and running a separate segregated fund established by a corporation." 11 CFR 114.1(b).

Here, UBAAPAC would finance the Project's communications costs, including the Project's website and email expenses, and defray these costs through payments from UBAAPAC's affiliated political committees. Affiliated political committees share contribution limits and may transfer funds freely among themselves. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 102.6(a)(1), 110.3(a)(1), and 110.3(c)(1). Because the Project is not a separately established legal entity but is, rather, a specially named undertaking of UBAAPAC, UBAAPAC may receive unlimited transfers of funds from its affiliated political committees to help defray the Project's costs. The Commission also concluded that UBA may pay the Project's administrative costs. As UBAAPAC's connected organization, UBA may use its general treasury funds to pay the Project's administrative costs without those payments being contributions to UBAAPAC. 2 U.S.C. §§431(7) and 441b(b)(2)(C); 11 CFR 114.1(b) and 100.6(a).

The Commission considered, but could not approve a response by the required four affirmative votes on the consequences of UBA's acceptance of payments from its affiliated state bankers associations to help pay the Project's administrative costs, nor on the circumstances under which affiliated state bankers associations may provide support to UBAAPAC by compensating their employees for serving on the councils.

Date: September 22, 2011; Length: 9 pages

(Posted 10/4/2011; By: Zainab Smith)

Resources:

- [Advisory Opinion 2011-14](#) [PDF; 4 pages]
- [Commission's consideration of AOR 2011-14](#) 
- [Brochure: Coordinated Communications and Independent Expenditures](#)
- [Brochure: Internet Communications and Activity](#)
- [Brochure: Volunteer Activity](#)

Advisory Opinions: Alternative Disposition of AOR 2011-18

On October 13, 2011, Western Representation PAC withdrew its request for an advisory opinion regarding reporting obligations for independent expenditures made via e-mail during the 2012 Presidential election.

(Posted 10/17/2011; By: Myles Martin)

Resources:

- [Withdrawal of Advisory Opinion Request 2011-18](#) [PDF; 2 pages]
- [Agenda Document No. 11-59](#) (Drafts A and B) [PDF]