FEC Practice Guide for Corporations and their PACs

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Authors

Charles Borden
Partner, Washington, DC

Charles leads Allen & Overy’s Political Law Practice. He regularly counsels multinational corporations on the intersection of law and political activity, including regulatory and compliance obligations and the political and reputational consequences of political activity. Charles’ areas of focus include campaign finance law; state and local lobbying law; the SEC’s regulation of municipal advisors; the federal pay-to-play rules; laws regulating the solicitation of contracts and investments from public sector entities; state and local pay-to-play laws; and federal, state, and local laws concerning gifts, entertainment, post-employment restrictions for former public employees, procurement, public financial disclosures, and government ethics. Charles co-teaches a course on government ethics at Harvard Law School, where he is a Visiting Lecturer in Law. He is also a Visiting Fellow at the Centre for Analysis of Risk and Regulation (CARR) at the London School of Economics. The Centre focuses on cross-border regulatory analysis, including with respect to the regulation of public corruption and political activities.

Samuel Brown
Associate, Washington, DC

Sam’s practice focuses on political law issues related to commercial interactions with public sector entities. Among other topics, he counsels multinational corporations on pay-to-play issues, placement agent regulations, lobbying regulations, gifts and entertainment, revolving door restrictions, campaign finance laws, and issues relating to the federal Freedom of Information Act and state Public Records Acts. Sam has experience with the regulation of municipal securities and municipal advisors, as well as other securities regulation and enforcement matters. He also counsels financial services clients on anti-money laundering and anti-corruption issues. Sam joined Allen & Overy after serving as Counsel to Commissioner Ellen Weintraub of the Federal Election Commission.

Claire Rajan
Associate, Washington, DC

Claire represents clients in regulatory, enforcement, and litigation matters with a focus on political law issues. She advises clients on laws regulating campaign finance, lobbying, procurement, pay-to-play practices and gifts to public officials. Claire has developed expertise with compliance programs, particularly while on multiple secondments to major global financial services providers. Prior to joining Allen & Overy, Claire worked as a litigation attorney for the Federal Election Commission and served as counsel to Commissioner Ellen Weintraub. Her FEC litigation experience includes matters at the U.S. Supreme Court, as well as various federal circuit and district courts throughout the U.S.

1 Special thanks to Daniel Holman, Lindsay Kennedy, Jana Steenholdt, and Kate Wooler for their contributions to this Guide.
How to use this guide

This Guide is organized into discrete modules intended to allow the reader to focus on the issue most relevant to him or her at a given point in time. In addition to overviews of the relevant legal obligations, the Guide walks through the various Federal Election Commission (“FEC”) offices and processes with which a corporation or its political action committee or “PAC” (also referred to as a separate segregated fund, or “SSF”) may interact to demystify the process for compliance and in-house legal personnel, including the staff responsible for reviewing all reports filed with the FEC, the Audit Division, and the various enforcement processes. The FEC has many complex procedures that are memorialized in a mix of statutes, regulations, Commission policies, and directives, as well as norms that have developed in practice.

The Guide contains many tools for in-house compliance and legal personnel, including numerous Practice Tips and specific modules on how to mitigate legal and reputational campaign finance law risk and how to respond if a potential violation is discovered.
# Introduction

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Summarizes the most relevant legal obligations applicable to corporations, regardless of whether the corporation operates a PAC.

Summarizes the key operational requirements for a corporate PAC, including how to establish a PAC, file FEC reports, and keep necessary records.

Describes the tools available to corporate PACs to raise money and related restrictions.

Focuses solely on the more restrictive obligations applicable to PACs established by U.S. subsidiaries of foreign corporations.

Describes the advisory opinion process by which an entity subject to FECA can seek clarity on the application of existing law to a proposed activity.

Describes the manner in which PAC administrators will interact with the FEC Division responsible for reviewing all reports filed by the PAC.

Describes the audit process and the ways in which the PAC can seek to influence the outcome, the importance of robust record-keeping, and the unique public nature of the audit.

Describes the FEC’s enforcement process, highlighting your opportunities to respond to allegations and frame the issues.

Describes best practices to establish and operate a compliance program that is robust, but also tailored to your specific needs.

A step-by-step guide to use if a potential FECA violation is discovered.
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Introduction²

U.S. and multinational corporations increasingly recognize the importance of engaging with government actors and the political process. Regulatory developments and public procurement, directed both in Washington and in state capitols, can have a significant impact on revenue and profitability. As one recent McKinsey & Company study found, about 30 percent of earnings for companies in most industries is at stake from government and regulatory intervention, with the figure rising to 50 percent in highly regulated sectors such as finance.³ As a result, corporations need to incorporate a comprehensive government relations program into their overall corporate strategy.

One important component of a successful government relations program is a strategy for engaging in the electoral process. For most companies that are electorally active, the principal form of engagement is through “political action committees” or “PACs.” Direct corporate contributions are prohibited at the federal level, and there are important legal limits to directing employees’ political giving. However, a corporation may establish and maintain a PAC and direct the PAC’s contributions, as long as the PAC is funded by voluntary contributions from executives and senior employees. Corporate PACs may also hold events and many of its administrative expenses may be paid directly by the corporation. The importance of corporate PACs is evidenced by their collective fundraising: in 2015, the year prior to the actual election, corporate PACs raised over $168 million in contributions.⁴ In the last electoral cycle, which was a mid-term election, corporate PACs received $378 million in contributions over a two-year period.⁵

Corporate political activities are highly regulated as they are subject to a complex web of federal, state, and local laws and regulations. These restrictions are seldom intuitive, and they have been further complicated by a series of recent court decisions that have modified (in some cases, significantly) statutes and regulations that remain on the books. Moreover, a violation of political laws—even a minor “foot fault”—can potentially have significant reputational and brand consequences.

The purpose of this guide is to provide a high-level “user’s manual” for companies that are politically engaged or that are seeking to increase their electoral participation. Our focus is on the rules that apply at the federal level, though we occasionally discuss laws and regulations that also apply to corporate political activity at the state and local levels. In particular, this Guide is a resource for understanding and complying with federal

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² This Guide is for general guidance only and does not constitute definitive advice. This Guide is not intended to address every permutation of federal campaign finance law or other related laws that may apply to corporate political activity. For legal advice regarding your specific circumstances, please contact the Allen & Overy Political Law Team.
⁴ FEC 2016 Political Action Committee Summary by Type, Total Contributions (summary data as reported by corporate PACs and available on the FEC’s Campaign Finance Disclosure Portal, time period spanning from January 1, 2015 through December 31, 2015).
⁵ FEC 2014 Political Action Committee Summary by Type, Total Contributions (summary data as reported by corporate PACs and available on the FEC’s Campaign Finance Disclosure Portal).
campaign finance laws and the nuances of the FEC, the agency that oversees these laws. Throughout, we attempt to provide companies—and particularly their legal, compliance, and government relations professionals—with a practice-oriented overview of the key legal issues, as well as practice tips gleaned from our experience working in this area.

What are federal campaign finance laws and what is the role of the Federal Election Commission?

Broadly speaking, federal campaign finance laws regulate the role of money in federal elections, in large part by imposing prohibitions on who can make political contributions and limits on the amount of contributions for those actors who are permitted to give. Federal campaign finance laws also comprehensively regulate the financing of political entities, such as campaigns and political parties.

From the perspective of corporations, federal campaign finance laws focus on two main areas. First, they impose a number of restrictions on the manner in which corporations may engage in the electoral process. Most notably, corporations are prohibited from making direct contributions to federal candidates. As a consequence of this restriction, the manner in which a corporation hosts candidate events or allows employees to use corporate resources to support candidates or parties is subject to numerous restrictions administered by the FEC.

Second, federal campaign finance laws broadly regulate the establishment and operation of corporate PACs. A PAC must register with the FEC, file periodic reports, maintain books and records, and observe a number of restrictions in its operations. Importantly, PACs that are established by a U.S. subsidiary of a foreign corporation are subject to further restrictions because the foreign parent company and foreign employees’ involvement with such PACs may implicate a sweeping ban on foreign nationals making contributions or otherwise participating in the U.S. political process.

The FEC is the federal agency with primary civil authority over the federal campaign finance laws. In this role, the FEC is responsible for adopting regulations, interpreting the laws on the books, and providing regulatory guidance to political actors, including corporations with affiliated PACs. The FEC is also responsible for civil enforcement of the laws. In this capacity, the FEC can seek monetary fines and other remedial measures, conduct audits of PACs, and sue to enforce the laws. Responsibility for criminal enforcement of the federal campaign finance laws rests with the Department of Justice (“DOJ”).

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6 This guide does not address other legal regimes that may also affect a PAC’s operations, including tax law, employment law, and state and municipal laws. In particular, this Guide does not address other federal restrictions that might apply to corporate political activity and individual employee contributions, known as pay-to-play laws. The Municipal Securities Rulemaking Board (“MSRB”), Securities and Exchange Commission (“SEC”), and Commodity Futures Trading Commission (“CFTC”) each have pay-to-play laws that restrict covered companies and employees from making contributions to certain state or local officeholders, even when those officeholders are running for a federal office. If you have questions about any of those issues, please contact the Allen & Overy Political Law Team.
What are the risks associated with non-compliance?

The most obvious risk associated with non-compliance is being subject to an FEC enforcement matter. Such matters are often initiated by the filing of a complaint with the FEC. Any individual can file such a complaint—including whistleblowers, former employees, reform organizations, or even political opponents of a candidate or party that the corporation’s PAC supported. Understanding your rights in responding to a complaint and how the FEC’s process will play out is crucial. Even if the enforcement matter is resolved in your favor, the process can create reputational risk. And once the matter is resolved, documents created during the enforcement process, including the PAC’s responses to the allegations, will become public.

Outside the enforcement context, significant reputational and brand risk may result from the fact that so much information about corporate political activities is readily available in the public sphere. The FEC’s primary purpose is to provide transparency regarding the money raised and spent in federal elections, meaning that most information related to the FEC and its business is made public. Every candidate, political party, and PAC must file reports with the FEC, which contain information about all contributions made by the PAC, contributors to the PAC, and expenses incurred by the PAC. These reports become public almost immediately upon filing. The reported data is consolidated to make it more easily searchable and usable. This heightens the need to ensure that each report is complete and accurate. Moreover, there is an increasing media focus on corporate electoral engagement, campaign finance issues, and where the two intersect. These issues are covered by both newer media entities with a specialized focus on the “business” of politics, as well as new dedicated teams with a focus on campaign finance at more traditional publications. There are also a number of active non-profit entities and advocacy groups dedicated to campaign finance reform that regularly comment on corporate political activities and seek to increase public attention to those activities.
Module 1:
An Overview of Federal Corporate Campaign Finance Laws

Before discussing the federal campaign finance obligations that apply specifically to corporate PACs, we address briefly the obligations upon corporations, including those that have not established a PAC. Federal campaign finance law places a number of restrictions on corporate political activity, as discussed in the first section of this module below. The second section of the module provides an overview of some of the more common ways in which corporations can participate in federal elections other than through a corporate PAC.

1.1 Restrictions on Corporate Political Activity

(A) Corporate contributions to federal candidates are prohibited.

A corporation may not use corporate funds to make contributions in connection with Federal elections. This means that corporate money cannot be used to write a check to a federal candidate’s campaign committee or to a political party. As discussed below, this also means that a corporation cannot make an “in-kind” contribution to a candidate by using corporate resources to support that candidate’s campaign.

The corporate contribution ban does not restrict a corporation’s ability to make independent expenditures or contribute to “Super PACs,” as addressed in Section 1.2 below.

This prohibition comes into play for corporations in two primary ways:

(a) A corporation cannot make direct contributions to federal candidates, traditional PACs, or political party committees from corporate funds, including in-kind or non-monetary contributions. In contrast, some states and localities permit corporate contributions.

(b) Employees cannot use corporate resources in a way that would result in an inadvertent in-kind contribution to a candidate. This can include using corporate resources for

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7 52 U.S.C. § 30118(a). A “contribution” is defined as “(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” 52 U.S.C. § 30101(8); 11 C.F.R. §§ 100.51-100.56.

8 A prohibited corporate contribution may result if a corporation provides of goods or services to a candidate or party for free or at a special discount. As long as a company provides a political actor with goods or services at the usual and normal charge, and in the same fashion as for other customers, no prohibited corporate contribution results. Discounts may be permitted, but only to the extent that they are offered on the same terms and conditions that apply to non-political customers (e.g. the discounts are provided to all customers who purchase goods over a certain volume). See generally 11 C.F.R. §§ 100.52(d), 100.111(e)(1).

campaign purposes. For example, individual employees or corporate executives might want to use their office email, phones, letterhead, stamps, office space, or staff time to assist with fundraising or other efforts on behalf of a federal candidate’s campaign. Even if the corporation is unaware that the employee is engaging in this activity, it could result in the corporation making a prohibited corporate contribution. There is a narrow exception available that permits a limited amount of volunteer activity without triggering the prohibition. Employees’ use of corporate resources also can create issues under federal pay-to-play laws, which we have addressed in other publications.\(^{10}\)

To ensure compliance with the ban on corporate contributions, corporations should restrict employees’ use of corporate resources. Corporations often address this risk through the implementation of a Political Activities Policy that alerts employees to their obligations when engaging in individual political activity.

For more information on hosting candidate events on corporate premises, see Section 1.2 below.

**Practice Tip:**
To ensure an employee does not unwittingly make a prohibited corporate contribution on the corporation’s behalf, adopt a Political Activities Policy to guide employees on how they may engage in political activity in the workplace.

(B) Corporations are prohibited from “facilitating” the making of contributions by third parties.\(^{11}\)

Facilitation involves the use of corporate resources or facilities to engage in fundraising activities on behalf of a candidate or PAC (other than the corporation’s own PAC). This comes up most often when candidates hold a fundraiser on corporate premises, and especially where those events are open to employees who are not in the “restricted class.” In such circumstances, care should be taken to ensure that the corporation does not use corporate resources in support of the fundraising, which may result in a prohibited corporate contribution. In most cases, corporate “facilitation” will also involve the making of a prohibited in-kind contribution, but the prohibition on facilitation also applies in circumstances where no contribution would result. Examples of activities that may result in corporate “facilitation”


\(^{11}\) 11 C.F.R. § 114.2(f)(1).
include providing catering or food services at no or reduced charge, having corporate representatives collect and forward contributions to a candidate, or using threats or coercion to urge an employee to make a contribution.

(C) **Foreign nationals are prohibited from spending money or directing political activities in connection with federal, state, or local elections.**

Foreign nationals—including foreign corporations, individuals, or other entities—are prohibited from making contributions or spending money in connection with a federal, state, or local election. Even in those states and localities that generally allow corporate contributions, contributions from foreign corporations are prohibited as a matter of federal law. This is one of the few areas where the FEC has authority over state or local elections.

This prohibition is quite broad in the types of activity that it restricts. A foreign national may not directly or indirectly fund a contribution, donation of money to a candidate or party or promise to do so. As with other restrictions on contributions, this prohibition restricts foreign nationals’ ability to make in-kind or non-monetary contributions. Foreign nationals also cannot direct, control, or directly or indirectly participate in the decision-making of any other entity, including a corporation, with respect to making contributions, donations or spending money in connection with a federal, state or local election.

As a consequence, it is particularly important that foreign affiliate entities do not directly or indirectly fund or subsidize a U.S. entity’s corporate political activity. In addition, foreign nationals cannot be involved in decision-making in connection with corporate political activity in the United States, including with respect to the operation and administration of a PAC. The effect of this prohibition as it relates to PACs is discussed in greater detail in Module 4.

**Practice Tips:**

- Review the corporate structure and corporate governance policies to restrict involvement of foreign nationals in the corporate political activity of the U.S. entity.
- Ensure no foreign entity directly or indirectly subsidizes PAC expenses or state and local political contributions.

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12 U.S. citizens and U.S. permanent residents (green card holders) are not subject to the prohibition.
13 11 C.F.R. § 110.20(i).
(D) Contributions “in the name of another” that are intended to hide the identity of the source of funds are strictly prohibited.

As a result of the limits on individual contributions and the prohibitions on corporate contributions discussed in this section, individuals may be tempted to make contributions that evade these restrictions by having other individuals make a contribution and then reimbursing that individual for their contribution. This is a serious violation and—where corporate or foreign funds are used to make the reimbursement—could result in multiple violations from the same act. These types of violations are taken seriously by the FEC and are often pursued criminally by the DOJ.

In addition, reimbursement schemes often also involve reimbursement of state and local contributions, which can lead to additional civil and criminal liability.

In many such cases, senior executives solicit contributions from employees and direct reimbursements for those contributions from corporate funds. To evade detection, individuals have incorporated the reimbursements into annual bonuses or created false reimbursement expense requests.

Often, once the corporation uncovers these schemes, it conducts an internal investigation and self-reports its findings to the Federal Election Commission to obtain leniency in the potential penalty. We address self-reporting in greater detail in Section 8.2.

Practice Tips:

• Ensure supervisors are aware that bonus and compensation packages should not take into account an employee’s contributions to or participation in the PAC.

• Leverage your compliance program’s existing internal controls structure. A rogue employee might ask subordinates to make contributions and then reimburse them as part of a bonus or a faux expense reimbursement. If compliance personnel are aware of the risk, they can be on the lookout for red flags.

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14 This is separate and distinct from the “earmarking” rules, which apply when a contributor directs (either orally or in writing) a contribution made through a conduit or intermediary to a specific candidate. See 11 C.F.R. § 110.6(b)(1). Earmarked contributions require additional disclosure, and in certain circumstances may count against multiple contribution limits. Of particular relevance to this Guide, an earmarked contribution which is solicited from the restricted class by a corporation, and which is collected by the corporation’s PAC, is considered a contribution to both the PAC and the candidate, and from both the individual contributor and the PAC. See 11 C.F.R. § 114.3.

(E) National banks are prohibited from making contributions to federal, state or local candidates.

National banks (as well as any corporation organized by authority of any law of Congress) are prohibited from making any contribution or providing anything of value to any federal, state, or local candidate or entity (except a loan provided in the context of usual and customary banking services) in connection with any election to political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office. This prohibition applies to all federal, state, and local elections, political conventions, and caucuses. At present, the FEC has not extended the holding in *Citizens United* to national banks. Unlike other corporations, therefore, national banks may not make independent expenditures or contribute national bank funds to Super PACs.

This prohibition only applies to the national bank entity itself, and not to other corporate affiliates of the national bank. In addition, the national bank may form a corporate PAC and its employees may make contributions from their own funds to the PAC in their personal capacity. This restriction also does not affect the bank’s ability to allow a campaign to open a bank account, pay interest on dividends, waive fees in connection with those accounts, or provide a campaign with a loan, as long as these services or concessions are consistent with the bank’s usual business practices for other customers.

The Office of the Comptroller of the Currency (“OCC”) has stated that if a bank examiner discovers a direct or indirect political contribution is made by a national bank, the OCC will require that the bank stop the practice, take measures to prevent its recurrence, and make appropriate referrals to the FEC. If the FEC does not pursue the matter, OCC will consider taking appropriate action, including supervisory and enforcement actions.

(F) Federal government contractors are not permitted to make contributions pursuant to federal pay-to-play laws.

A person that holds a contract with the federal government may not make contributions to a federal candidate or party and may not solicit such contributions. This prohibition only applies to the contract holder and does not affect any other entity or person in the corporate family. In light of the prohibition on corporate contributions, this particular rule is most relevant to individuals who contract directly with the federal government. The ban does not affect the ability of a corporation that is a federal contractor to form a corporate PAC. It is not clear whether federal contractors can make independent

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17 *Id.*; 11 C.F.R. § 114.2.
18 In 2014, the FEC made some changes to the relevant regulations, but maintained certain prohibitions on national banks, including the ban on national banks making independent expenditures. Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797, 62801 (Oct. 2014).
22 52 U.S.C. § 30119(a). It is an open question as to whether this particular restriction applies to contributions to Super PACs.
23 52 U.S.C. § 30119(b).
expenditures or contribute to Super PAC and, for the time being, the FEC has not addressed the issue. Unlike other federal “pay-to-play” laws, this particular ban does not restrict personal contributions from employees, partners, shareholders, or officers of businesses with government contracts.

(G) Federal pay-to-play laws may further restrict corporate and individual political action in federal elections.

Although not administered by the FEC, other federal laws may restrict contributions and solicitations by corporations, PACs, and certain employees. The MSRB, SEC, and CFTC each have pay-to-play laws that restrict covered companies and employees from making contributions to certain state or local candidates who have direct or indirect authority over certain types of contracts. These restrictions include contributions to federal candidates who are also covered state or local officeholders. Contributions to sitting Governors, State Treasurers, and Mayors—including federal contributions to incumbents seeking federal office—generally are covered by these pay-to-play laws, and can potentially bar the contributor's employer from doing business with various public entities in the state or local officeholder’s home jurisdiction.

Companies that are subject to federal pay-to-play laws typically have robust policies and procedures designed to minimize the risk of running afoul of these laws. We have addressed these obligations and compliance structure in other publications.

24 Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015); see, e.g., FEC MUR 6726 (Chevron Corporation).
25 However, if an individual personally holds a contract with the federal government, that person would be subject to the ban.
26 See MSRB Rule G-37; SEC Rule 206(4)-5 (17 C.F.R. § 275.206(4)-5); CFTC Rule 23.451; see also FINRA Regulatory Notice 14-50 (proposing FINRA Rules 2271, 2390, and 4580 regarding pay-to-play restrictions).
Summary of Federal Corporate Political Activity Restrictions:

<table>
<thead>
<tr>
<th>Source</th>
<th>Contributions to federal candidates</th>
<th>Contributions to state or local candidates</th>
<th>Independent expenditures/contributions to Super PACs</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. corporation</td>
<td>Prohibited</td>
<td>Depends on local law</td>
<td>Permitted</td>
</tr>
<tr>
<td>U.S. national bank</td>
<td>Prohibited</td>
<td>Prohibited</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Foreign corporation/person</td>
<td>Prohibited</td>
<td>Prohibited</td>
<td>Prohibited</td>
</tr>
<tr>
<td>U.S. corporate subsidiary of a foreign parent</td>
<td>Prohibited</td>
<td>Depends on local law*</td>
<td>Permitted*</td>
</tr>
<tr>
<td>Federal Government Contractors</td>
<td>Prohibited</td>
<td>Permitted*</td>
<td>Unresolved*</td>
</tr>
</tbody>
</table>

* These activities are only permitted to the extent that the activity does not include any direction or funds from the foreign parent or any other foreign person.

1.2 Corporate Political Activity

As discussed in the introduction, one of the most common forms of corporate political activity is the establishment of a corporate-run PAC. Some other common ways in which corporations can get involved in elections are described below.

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28 This summary is focused on restrictions imposed by FECA, and does not address restrictions imposed under federal pay-to-play laws other than the federal contractor ban, including MSRB Rule G-37, SEC Rule 206(4)-5, and CFTC Rule 23.451. See supra at note 26.

29 A “contribution” is defined as “(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” 52 U.S.C. § 30101(8); 11 C.F.R. § 100.51-100.56.

An “independent expenditure” means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.” 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

30 Federal contractors’ state and local contributions may be prohibited under state and local law for reasons unrelated to the donor’s status as a federal contractor.

31 See FEC MUR 6726 (Chevron Corporation), Factual and Legal Analysis, at 7 fn. 3 (Mar. 11, 2014).
(A) Candidate events.

Corporations may host federal candidates in the office for a “meet and greet” (i.e., a non-campaign event), candidate appearances, or a fundraising event. The rules that apply to such events depend in large part on whether the event is open only to the “restricted class” (i.e., those employees who are eligible to be solicited for the PAC), or is open to a broader audience, such as other employees or members of the public.32

Meet and Greet (Non-Campaign Event)

First, a corporation may host a “meet and greet,” which is a non-campaign-related event involving a candidate or officeholder. Such events should not be connected to the candidate or officeholder’s campaign, and generally will not implicate campaign finance laws provided that this requirement is followed.

At a “meet and greet,” the candidate may speak generally about issues of interest to the corporation and the general public, such as pending legislation or other public policy issues. However, “meet and greets” may not involve any solicitation of campaign contributions or election-related advocacy (i.e., the individual appearing at the event should not encourage attendees to support or contribute to his or her candidacy). Accordingly, a reference to the speaker’s campaign or to the campaign or qualifications of other candidates could change the character of the appearance to one that is for the purpose of influencing a federal election.33

Corporations are not limited in terms of who they can invite to a meet and greet – the restricted class, other employees of the corporation and the general public may all attend. And because meet and greets are not considered to be related to a federal campaign or election, corporations are permitted to pay for expenses associated with such events, regardless of who is in the audience.34 However, corporations should still be mindful of the potential gift law and lobbying issues associated with hosting candidates and officeholders on corporate grounds.

Candidate Appearance

Corporations may also host a candidate on corporate premises to give a campaign speech or solicit contributions. The restrictions that apply to such events depend on the audience that is invited to attend.

1. Restricted Class Events

Where only members of the restricted class are invited to attend a candidate appearance, corporations have a good deal of flexibility in planning for the event and paying associated costs. In the context of such events, the corporation may pay certain costs associated with the event (e.g., the cost of a meeting

32 See Module 3, infra.
34 The corporation may not pay for travel if the candidate holds a collateral campaign event before or after the corporate event. See FEC Advisory Opinion 1996-11 (National Right to Life Conventions, Inc.), at 6.
space, or catering costs). The corporation can discuss the event in internal publications, and can even endorse the candidate, but in doing so must be careful to limit all election-related communications to only the restricted class.\(^{35}\) Note that, if a corporation spends in excess of $2,000 to pay for communications that expressly advocate for the election or defeat of a specific candidate, the corporation would be required to report the expenditures on the FEC Form 7.\(^{36}\)

Candidate appearances can also involve the solicitation of contributions to the candidate in question, provided that the solicitations are limited to the restricted class. However, there are still limits on corporate facilitation, and the corporation and corporate personnel cannot assist in collecting contributions for the candidate in question.\(^{37}\) Among other things, they cannot collect checks for the campaign or otherwise act as agents for the campaign in forwarding or handling contributions. The corporation may not pay a candidate’s travel-related expenses associated with such an event, and campaign-prepared materials (e.g., campaign brochures) may not be distributed.

2. Non-Restricted Class Events

A corporation may also host a candidate on corporate premises for the candidate to give a campaign speech where an audience beyond the restricted class is invited to attend.\(^{38}\) However, such events are subject to numerous restrictions.\(^{39}\) The corporation can coordinate with the party or candidate on the structure, format and timing of the appearance, but the corporation cannot discuss the candidate’s campaign plans, projects, or needs with candidate.\(^{40}\) The corporation or its PAC may not expressly advocate for or against a candidate and may not promote or encourage express advocacy by employees in connection with a candidate appearance.\(^{41}\) The corporation also must give equal opportunity to other candidates running for the same office or other parties to speak, if those candidates so request.\(^{42}\)

There are restrictions on solicitations at such events. The corporation and its PAC may not solicit contributions in connection with the event.\(^{43}\) Instead, the candidate, a representative of the candidate, or a party representative may ask for contributions to the campaign or party or ask that contributions to the corporate PAC be designated for the campaign or party, and also may leave campaign materials or envelopes for attendees.\(^{44}\) However, the candidate cannot directly accept contributions while on corporate premises (including before, during, and after the appearance).\(^{45}\)

\(^{35}\) See generally 11 C.F.R. § 114.2(c).

\(^{36}\) 11 C.F.R. § 100.8(b)(4).

\(^{37}\) 11 C.F.R. § 114.3(c)(2).

\(^{38}\) 11 C.F.R. § 114.4(b)(2)(i).

\(^{39}\) As with candidate fundraising events, a candidate appearance that is limited to members of the restricted class is subject to different rules.

\(^{40}\) 11 C.F.R. § 114.4(b)(1)(vii).

\(^{41}\) 11 C.F.R. § 114.4(b)(1)(v).

\(^{42}\) 11 C.F.R. § 114.4(b)(1).

\(^{43}\) Id.

\(^{44}\) 11 C.F.R. § 114.4(b)(1)(iv).

\(^{45}\) Id.
Provided that the restrictions described above are observed, a corporation may pay the expenses in connection with a candidate appearance without the payment being considered a contribution or expenditure.

3. Fundraising Events

A corporation can allow candidates or third parties to hold fundraising events on corporate premises. Because these events are typically not limited to the restricted class, they are subject to a number of restrictions. The expenses for such a fundraiser cannot be paid by the corporation. Instead, these expenses may be paid by the candidate’s campaign, the corporate PAC or individuals. If paid by the PAC or individuals, the expenses are treated as an in-kind contribution and will count towards the PAC or individuals’ contribution limits. To ensure that the corporation does not make a prohibited contribution by effectively “loaning” certain expenses, catering costs, employee time, and use of client lists must be reimbursed prior to the event. In contrast, the use of corporate space may be reimbursed within a commercially reasonable time (at the usual and normal rental charge).

(B) Independent spending.

Independent expenditures and contributions to Super PACs are permissible, but may be subject to additional reporting obligations and such activity must not be coordinated with a candidate or political party.

As a result of the Supreme Court’s decision in *Citizens United v. FEC*, corporations are now permitted to engage directly in political advertising, such as by running ads for or against a candidate using corporate funds (commonly known as “independent expenditures” and electioneering communications), as long as those expenses are made wholly independently of any candidate or political party. This means that independent spending must not be made in cooperation, in consultation, in concert, or at the request or suggestion of a candidate or political party.

It is important to note that an advertisement or other expenditure that is coordinated with a candidate is considered to be a contribution to that candidate, and would be a violation of federal law. In practice, however, it is less common that for-profit corporations make independent expenditures.

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46 11 C.F.R. §§ 100.52(d)(1); 114.2(a). For events held in one’s home, the hosts of a campaign fundraiser may pay for up to $1,000 per person per election for expenses incurred in connection with the invitations, food and beverage. 11 C.F.R. § 100.77. In addition, if a campaign fundraiser is held in a restaurant or similar venue where food and beverage or valet services are available for purchase and an attendee elects to purchase their own food, beverages, or valet services, such expenses are not incurred in connection with the fundraiser and would not count towards the individual’s contribution limits. FEC Advisory Opinion 2015-07 (Hillary for America).


48 11 C.F.R. § 114.9(d). However, if the corporation’s PAC makes use of the organization’s facilities in connection with a federal campaign, the PAC must pay for the use of the facilities in advance. FEC Advisory Opinion 1984-24 (Sierra Club), at 3.


Corporations are also permitted to make unlimited contributions to “Super PACs,” which are PACs that are established to make independent expenditures only. To qualify as a Super PAC, such a committee must not coordinate expenditures with candidates or political parties. In addition, Super PACs may not be established, maintained, or controlled by a candidate.

Independent expenditures and electioneering communications must be reported by the spender, and depending on the amount and proximity to the election, “real time” reports may be required. Similarly, contributions made to Super PACs will be reported to the FEC by the recipient PAC, similar to contributions made to traditional PACs.

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51 See SpeechNow v. FEC, 599 F.3d 686 (D.C. Cir. 2010); see also FEC Advisory Opinion 2010-11 (Commonsense Ten).
52 It should be noted that the FEC has issued only limited guidance on the operations of Super PACs, and at present there is a good deal of controversy regarding the specific limits that apply to Super PAC activities, though most of these issues are beyond the scope of this Guide.
Module 2:
Operating and Maintaining a PAC and Making Contributions

Although corporations may not make contributions to federal candidates using corporate funds, corporations may establish and operate a PAC, which is permitted to make contributions to and expenditures on behalf of federal candidates and other PACs. The corporation may use its general treasury funds to pay for the costs of operating and raising money for the PAC, and the corporation may exercise control over its PAC. In addition, there are numerous requirements for establishing and operating a corporate PAC.

2.1 Establishing and Registering the Corporate PAC

The Board of Directors of a corporation may vote to establish a corporate PAC. Obligations will commence almost immediately, so it is important to have already considered the compliance questions and dedicated resources prior to voting to establish a PAC.

The name of the PAC must include the full name of the corporation, typically followed by “Political Action Committee” or the abbreviation “PAC.” A parent or subsidiary entity typically need not be included separately but if two entities are jointly sponsoring the PAC, both entities should be included in the name of the PAC.

Within 10 days of establishing a PAC, a treasurer must be appointed and registration with the FEC must be filed using a Statement of Organization. A Statement of Organization must include the PAC’s full name, contact information (including a website, if any), the date the PAC was established, the names and addresses of any connected organizations (i.e., the company sponsoring the PAC) and affiliated committees, the name and address of the custodian of records, treasurer, assistant treasurer (if any), and the bank where the committee deposits its funds. If information disclosed on the Statement of Organization changes, the PAC must report the change on an amended Statement. Corporate PACs may also incorporate for liability purposes.

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53 Corporations may also establish a PAC that exclusively engages at the state and local level (often referred to as a Non-Federal PAC). These PACs are not required to register with the Federal Election Commission, but may be required to register in states in which the PAC is active.

54 Common words such as Incorporated, Corporation, and Association may be abbreviated to Inc., Corp., and Ass’n.

55 11 C.F.R. § 102.14(c).

56 11 C.F.R. §§ 102.1(c); 102.7.

57 If the PAC is established by a parent, list any PACs sponsored by subsidiaries. If the PAC is that of a subsidiary, only the PAC of the parent needs to be included. 11 C.F.R. § 102.2(b).

58 11 C.F.R. § 102.2(a).

59 11 C.F.R. § 102.2(a)(2).

60 11 C.F.R. § 114.12. Corporate PACs may be required to make certain filings with the Internal Revenue Service. Tax law obligations are not addressed in this Guide.
2.2 Overview of Key Prohibitions for PACs

The prohibitions discussed in Module 1 create particular obligations for corporate PACs. Primarily, corporate PACs must be careful not to violate the prohibition against direct corporate contributions, including making contributions to the PAC itself. Among other things, corporations may not use general treasury funds to make contributions to their corporate PACs or to other types of political committees or candidates. To assist in ensuring this prohibition is complied with, corporations may not commingle their treasury funds with the funds of their corporate PAC.

In spite of these prohibitions, the corporation may pay for operating expenses of the PAC, discussed in Section 2.5 below. The corporation may also provide the PAC with legal and accounting services if the individual providing the services is a regular employee of the company.

Corporations cannot reimburse employees for their contributions to the PAC (or any other political contribution). For example, a bonus or other discretionary compensation should not be designed to offset an employee’s political contributions.

In addition, the prohibition on foreign national involvement in U.S. elections results in additional restrictions on foreign national activity in connection with PACs. These issues are addressed more fully in Module 4.

2.3 Basic Organizational Requirements

Corporations often adopt By-Laws to govern their PACs, although they are not required to do so by the FEC. In addition, many companies adopt a PAC Manual, which helps individuals responsible for the operation of the PAC to understand their compliance obligations. PACs have flexibility to structure their organizational documents as best fits the organization and intended activity.

Corporate PACs may not share the same bank account as the corporation, as the term “separate segregated fund” suggests. The PAC must maintain at least one checking or transaction account for the PAC. This account is to be used for the PAC’s funds, which are derived from lawful federal political contributions.

PACs are subject to federal and state tax law obligations. It is common practice for the PAC to obtain its own unique Employer Identification Number (“EIN”) from the IRS. Although the PAC is not required to pay tax on contributions it receives, it may be required to pay tax (and file tax returns) on income, typically limited to interest earned on its deposits. If the PAC deposits its funds in an account that does not accrue interest, filing federal tax returns may not be necessary.

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\[61\] The PAC’s bank account must be at a State bank, federally chartered depository institution (including a national bank), or a depository institution the depositor accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration. 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.2.

\[62\] Note that affiliated PACs may not share the same bank account, though they may establish separate bank accounts at the same financial institution. See FEC Advisory Opinion 1986–33 (Metropolitan Mortgage); FEC Advisory Opinion 1979-53 (Ownership Campaign).
Practice Tips:

- Drafting a complete set of organizational documents and policies before the PAC is formally established helps ensure full compliance, particularly when personnel changes occur at a later date.
- Common operational documents for a corporate PAC include: By-Laws, PAC Manual, and a policy to guide the PAC’s decisions regarding which candidates to support with contributions.

2.4 PAC Personnel

The treasurer is a key player for the ongoing management of the PAC. The treasurer may be subject to liability in his or her official capacity for failing to comply with the obligations of the position and in certain circumstances, may be personally liable. The treasurer’s unique responsibilities do not absolve the PAC from its responsibilities to accurately report its activities. The treasurer (or registered assistant treasurer) is responsible for:

(a) filing complete and accurate reports and statements on time;
(b) signing and attesting to the accuracy of those reports and statements;
(c) depositing receipts in the committee’s designated bank within 10 days;
(d) authorizing expenditures or appointing an agent (either orally or in writing) to authorize expenditures;
(e) monitoring contributions to ensure compliance with applicable limits and prohibitions; and
(f) keeping the required records of receipts and disbursements for three years after the transaction is last reported in FEC reports.

A PAC may not raise or spend any funds when there is a vacancy in the office of treasurer. As a result, it is advisable for a PAC to appoint and register an assistant treasurer who may assume the treasurer’s

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64 Combat Veterans for Congress PAC v. FEC, No. 13-5358 (D.C. Cir. July 28, 2015) (affirming that although the FEC may pursue remedies against a Treasurer in his or her official or personal capacity in connection with reporting failures, the PAC is separately and simultaneously responsible for reporting obligations).
65 Contributions not deposited within 10 days must be returned to their donors.
66 11 C.F.R. §§ 104.14(a), (b), (d); 102.2(a); 102.7(c); 102.9(c); 103.3(a), (b); 110.1(k)(3).
office if he or she is unavailable and to fill vacancies in either position as soon as possible. If a new treasurer is appointed or the treasurer’s contact information changes, the Statement of Organization must be amended within 10 days.\(^{68}\)

The PAC’s treasurer bears responsibility to ensure that the appropriate books and records are created and maintained.\(^ {69}\) The PAC must designate a custodian of records on its Statement of Organization, which could be the treasurer, assistant treasurer or another person.

Most PACs are operated and managed by a PAC Board. The Board typically adopts the By-Laws that apply to the PAC and other policies.

### 2.5 PAC Expenses

Most costs associated with running the PAC and soliciting contributions to the PAC may be paid by the corporation (i.e., from funds derived from commercial activities). Permissible expenses include office expenses (phones, computers, and office space), personnel costs (salaries), fundraising expenses (mail costs or expenses related to a PAC fundraising event) as well as compliance costs (such as legal and accounting fees).\(^ {70}\) Generally, if the corporation pays directly for a PAC-related expense, it need not be reported on an FEC report, but if the PAC pays for its own administrative expenses, it must be reported on its FEC reports.

Corporations can pay operating costs of the PAC directly or by establishing a separate administrative account to be used solely for the PAC’s administrative expenses. However, a corporation’s funds, including the funds contained in any administrative account established to pay for PAC operating costs, may never be commingled with the PAC’s own funds.\(^ {71}\) One exception to this rule is when the corporation acts as a collection agent for the PAC (e.g., when collecting contributions via payroll deduction)—in that case, it may temporarily deposit contributions in a general account before transmitting them to the PAC.\(^ {72}\)

### 2.6 Making Contributions

Corporate PACs may make contributions to federal candidates, political parties, and other PACs. Contribution limits include in-kind (non-monetary) contributions. In-kind contributions most frequently become an issue when the PAC sponsors a fundraising event for a candidate. Specific restrictions apply to fundraising events that occur on corporate facilities, whether the candidate, PAC or an individual pays for the costs associated with the event.\(^ {73}\)

Corporate PACs often adopt a policy that outlines the factors the PAC will use to determine to whom to make a contribution. Many PACs focus their efforts on incumbents and will evaluate whether the

\(^{68}\) 11 C.F.R. § 102.2(a)(2).

\(^{69}\) 11 C.F.R. § 102.9.

\(^{70}\) 11 C.F.R. § 114.1(b).

\(^{71}\) Id. 11 C.F.R. §§ 114.1(b), 114.5(b); FEC Advisory Opinion No. 1981-19 (Louisiana State Medical Society PAC).

\(^{72}\) 11 C.F.R. § 102.6(c)(4), (5).

\(^{73}\) The more detailed fundraising restrictions regarding hosting fundraisers are not addressed in this Guide.
officeholder represents a district in which the corporation has offices or conducts business, whether the officeholder sits on committees that are relevant to the corporation, whether the officeholder supports or opposes legislation or issues of import to the corporation, the officeholder’s voting record, public positions, legislative proposals, or other considerations. The adoption of such a policy is not dictated by federal campaign finance laws, but is considered best practice.

In addition to policies about to whom to make contributions, corporations should consider whether there are types of entities to which its PAC will not make contributions. Many corporations that are subject to federal pay-to-play laws do not allow the PAC to make contributions to state and local political party committees or to state and local incumbents running for federal office, which minimizes the potential for anti-circumvention risk in that area. A corporation might make broad decisions about whether its PAC (or the corporation itself, if permitted) will give money to Super PACs, leadership PACs, joint-fundraising committees, and other vehicles used to fund electoral activity. These decisions go beyond PAC-specific policies and extend more broadly to corporate political activity, including at the state and local level.

2.7 Multi-Candidate Committee Status

There are two types of PACs—multi-candidate PACs and non-multi-candidate PACs. Once established, a PAC will be considered a multi-candidate PAC if it has:

(a) received contributions for federal elections from at least 51 persons;
(b) been registered with the FEC for at least 6 months; and
(c) made contributions to at least five federal candidates.\(^{74}\)

A PAC must file a Notification of Multicandidate Status Form, within 10 days of meeting the certification requirements or becoming affiliated with an existing multicandidate committee. This is important because multi-candidate PACs have higher contribution limits than PACs that are not qualified as such.\(^{75}\)

Multi-candidate corporate PACs may contribute $5,000 per election to federal candidates ($10,000 total for the primary and general elections) and $5,000 per year to another PAC. PACs that have not yet qualified as multi-candidate PACs are subject to the same contribution limits as individuals.

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\(^{74}\) 11 C.F.R. § 100.5(e)(3).

\(^{75}\) In a recent case, *Stop Reckless Economic Instability Caused by Democrats, et al. v. FEC*, No. 1:14-397 (E.D.Va. Feb. 27, 2015), the lower limits for non-multicandidate committees were challenged. The lower court upheld the existing limits for committees that had not yet qualified as multi-candidate committees. The case is currently on appeal before the Fourth Circuit, No. 15-1455. Oral argument took place on December 8, 2015.
2.8 Limits on Contributions Made by Corporate PACs

Some contribution limits are indexed for inflation and may change each election cycle. Others have remained at the same levels since the original statute was adopted in the 1970’s. The following chart provides the current limits for multi-candidate PACs and those that have not yet reached multi-candidate status.

2015-2016 contribution limits for corporate PACs:

<table>
<thead>
<tr>
<th>Recipient</th>
<th>Candidate Committee</th>
<th>PAC (SSF and non-connected)</th>
<th>State/District /Local Party Committee</th>
<th>National Party Committee*</th>
<th>Additional National Party Committee Accounts*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multi-candidate PAC</td>
<td>$5,000 per election</td>
<td>$5,000 per year</td>
<td>$5,000 per year (combined)</td>
<td>$15,000 per year, per committee</td>
<td>$45,000 per account, per year</td>
</tr>
<tr>
<td>Non-multi-candidate PAC</td>
<td>$2,700 per election</td>
<td>$5,000 per year</td>
<td>$10,000 per year (combined)</td>
<td>$33,400 per year (indexed for inflation)</td>
<td>$100,200 per account, per year</td>
</tr>
</tbody>
</table>

* National party committees include the three national committees for each major party (DNC, DSCC, DCCC, RNC, NRSC, NRCC).

** Additional National Party Committee Accounts are for: (i) the presidential nominating convention; (ii) election recounts and contests and other legal proceedings; and (iii) national party headquarters buildings.

2.9 Filing Reports with the FEC and Record-Keeping Obligations

Filing FEC Reports

From a compliance perspective, filing complete and accurate reports with the FEC is the most important task for a PAC. Reports are made public almost immediately upon filing and are pored over by journalists, reform organizations, and political opponents. In addition, the FEC’s Reports Analysis Division, discussed in greater detail below, will review every report filed and may follow up with questions. This Division will decide whether to refer apparent reporting violations for enforcement or an audit.

Once the PAC has registered, the PAC must begin to file periodic reports of receipts and disbursements. Even if the PAC has no activity, it must file reports until the PAC terminates. PACs are required to file electronically if total contributions received or total expenditures made exceed, or are expected to
exceed, $50,000 in any calendar year. PACs that are not required to file electronically, but choose to do so, must continue to file electronically for that calendar year.

Corporate PACs usually recognize the importance of filing FEC reports in a timely, complete, and accurate manner. Some PACs outsource the task to non-attorney administrators who are familiar with the reporting requirements and others prefer to use in-house resources for filings and rely on counsel for specific questions as needed.

When are FEC Reports Due?

The filing schedule differs in election years and non-election years. In election years, a PAC can choose to file on either a quarterly or monthly filing schedule. During an election year, a PAC may change its filing schedule from quarterly to monthly (or vice versa). In non-election years, quarterly filers automatically switch to a semi-annual reporting schedule. Monthly filers continue to submit monthly reports. A PAC may elect to change its filing frequency by notifying the FEC in writing before making such a change, but may only do so once per year.

Practice Tip:

Plan ahead for your FEC filings. Late filings are subject to penalties and by law, very few excuses will be considered. Having the information ready and maintained as it occurs will help the reporting process run smoothly.

What must be disclosed on an FEC Report?

Regardless of the filing schedule that the PAC chooses, the content required to be disclosed in the FEC report is the same. Generally, a PAC must provide information about its receipts and disbursements.

The following information must be disclosed:

- Contributions received by the PAC (including in-kind contributions), including:
  - The contributor’s name, address, occupation, employer; and
  - The amount of the contribution.\(^79\)

- Expenditures made by the PAC, including:

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76 11 C.F.R. § 104.5(c)(2)(i).
77 11 C.F.R. § 104.5(c)(3).
78 11 C.F.R. § 104.5(c).
79 11 C.F.R §§ 100.12; 104.3(a)(4).
o Contributions made to candidates and party committees (including in-kind contributions) and related information, such as the candidate amount and date, as well as the recipient candidate or PAC, the office sought, and election for which the contribution was made;

o Independent expenditures;

o Coordinated expenditures; and

o Operating expenditures, including the amount, payee information, and purpose of the expenditure.

- Other transactions constituting a receipt or disbursement, including:

  o Refunded contributions received by the PAC;

  o Transfers between affiliated PACs and accounts;

  o Charitable donations; and

  o Loans.

As discussed in further detail below, the PAC is required to maintain records to support the disclosures made in its FEC filings pursuant to the FEC’s record keeping requirements for corporate PACs.

**Safe Harbor**

PACs and their treasurers are responsible for obtaining and reporting the necessary information to file complete and accurate reports. When certain reporting information related to the contributor is incomplete, the PAC and the Treasurer may nevertheless be in compliance with the law if they can demonstrate that they used “best efforts” to obtain the required information, which generally involves requesting the information and submitting a follow-up request for the information. Solicitations should specifically include a request for the required information about the contributor and explain that the PAC is required to make its best efforts to obtain and report such information.

**Practice Tip:**

Include a donor card or response form in written solicitations to accompany the contribution. The form can request that all necessary contributor information be sent to the PAC.

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80 11 C.F.R. §§ 102.9(d); 104.7(a).
81 11 C.F.R. § 104.7.7.
Record-Keeping

The FEC requires that PACs maintain records sufficient to substantiate the information contained in reports filed with the FEC. Some record-keeping requirements are required by law or regulation, whereas others should be maintained as a matter of best practice. The PAC must maintain its records in a manner that allows them to be available to the FEC for inspection upon request.

The PAC must retain a copy of every report filed with the FEC, along with original back-up records relevant to the report or notice (such as bank statements, paid invoices, etc.), for three years after the report is filed.

For contributions made to the PAC, the PAC must retain a copy or digital record of each check or written instrument by which a contribution of $50 or more is made to the PAC. PACs must also maintain certain information about contributors to the PAC. Generally speaking, for contributions from employees, the PAC should maintain a record of the contributor’s name and address, amount of the contribution, date of receipt, and the donor’s occupation and employer.\(^{82}\)

For all disbursements made by the PAC, the PAC must record the following information: date, amount of the payment, name and address of the payee, and purpose of the disbursement.\(^{83}\) For disbursements exceeding $200, the PAC must also keep a receipt, invoice, or canceled check.\(^{84}\)

For contributions to federal candidates, the PAC must record the date, amount, office sought by the candidate (including state and congressional district), and the election for which the disbursement was made (primary, general or special election).\(^{85}\)

In addition, the FEC recommends that PACs keep records on transfers from affiliated PACs, bank loans, interest and dividends received, and repayments on loans made by the PAC. PAC records should contain the name of the source and the date and amount of each receipt.

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\(^{82}\) Although corporate PACs may not solicit other PACs, unsolicited contributions may be received and the recipient PAC should maintain records of the amount, date of receipt and the name and address of the contributor. 11 C.F.R. § 102.9(a)(3). Many PACs refuse to accept unsolicited contributions, whether from other PACs or other sources, to avoid potential questions about whether the contribution was genuinely unsolicited.

\(^{83}\) 11 C.F.R. § 102.9(b)(1).

\(^{84}\) 11 C.F.R. § 102.9(b)(2).

\(^{85}\) 11 C.F.R. § 102.9(b)(1)(iii).
Practice Tip:

Creating a procedures document or PAC Manual that describes these obligations and tailors the procedures to the company’s structure and operations will help ensure that inadvertent reporting or record-keeping violations do not occur.

2.10 Operation of PACs Within the Corporate Family and in Member Organizations and Trade Associations

An important question when establishing a PAC and as the corporate structure evolves over time is the extent to which the PAC will engage with other entities in the corporate family. The corporate PAC may solicit personnel of a parent, subsidiary, branch, division, or affiliate of the connected organization. This broadens the number of people who can contribute to the PAC, but any affiliated PACs are subject to a single limit when making and receiving contributions.

There are complex criteria for determining whether a related entity is affiliated, but it is helpful to have considered these factors at the outset, and to know whether the PAC will be considered to be affiliated with any other PACs. In addition, corporate restructurings, mergers, and acquisitions could result in changes to the entities that are considered affiliated. If newly acquired entities also have their own PAC, steps should be taken to address the new affiliation. In the case of a divestment or spin-off, it may be advisable to seek an Advisory Opinion to confirm that the PACs are no longer affiliated, and the timing of the disaffiliation.

86 11 C.F.R. § 114.5(g)(1).
Module 3:
Fundraising for the PAC

The success of your corporate PAC will depend largely on its ability to raise funds from eligible employees. The manner in which these solicitations are made and the tools available for fundraising are closely regulated. If your employees are members of a union, the company must also provide the union with the same methods of soliciting for the union-affiliated PAC that the corporation relies upon to solicit for its PAC.  

3.1 Who May Be Solicited and When

Corporate PACs may solicit employees of the corporation subject to certain guidelines and limits, but may not solicit non-employees or foreign nationals. Corporate PACs may solicit the “restricted class” or the “expanded class” periodically. Whether employees of other members of the corporate family may be solicited and the categories of employees that may be solicited as part of the “restricted class” are questions for which corporations and their PACs often seek an Advisory Opinion from the Commission, as discussed in Module 5.

Restricted Class: A corporate PAC may solicit its “restricted class” at any time. The restricted class consists of: the corporation’s executive and administrative personnel (i.e., employees who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional or supervisory responsibilities), the stockholders, and their families. The corporate PAC may also solicit executive and administrative personnel of any parent, subsidiary, branch, division, or affiliate of the connected organization. This may even extend to certain franchisees and licensees. Special rules apply in the case of a PAC established by a trade association, which can in certain circumstances solicit the employees of a corporate member of the association.

Determining the employees that are members of the restricted class can be nuanced and is unique to the corporate structure. It is important to identify the individuals who are within the restricted class, document those efforts, and to periodically update the list as restructuring or other personnel changes are made. When doing so, due to the restriction on foreign nationals making political contributions, the restricted class should be limited to U.S. citizens (including U.S. citizens living and working abroad) or permanent residents residing in the United States.

87 11 C.F.R. § 114.5(k).
88 11 C.F.R. §§ 114.1(c), (h).
89 11 C.F.R. § 114.5(g)(1). The FEC has set out factors to identify whether a corporate entity is per se affiliated. 11 C.F.R. § 100.5(g)(4). Alternatively, entities might be treated as affiliated based on consideration of 10 circumstantial factors to determine the relationship between the entities. 11 C.F.R. §§ 100.5(g)(4)(i)-(ii).
90 11 C.F.R. § 100.5(g)(2); see also, e.g., FEC Advisory Opinion 2012-12 (Dunkin’ Brands). But see FEC Advisory Opinion 2013-19 (Yamaha Motor Corporation) (Commission could not reach agreement that U.S. subsidiary of Yamaha Motor Company could establish a PAC and solicit employees of its dealers and service centers).
91 Notably, a corporate member of a trade association may grant permission to the trade association to solicit the corporation’s restricted class. To do so, the corporation must give advance written approval to the trade association. 11 C.F.R. § 114.8. A corporation may give such permission to only one trade association in any calendar year.
Corporate PACs may not use corporate funds—meaning money obtained as a result of a commercial transaction—to make contributions to candidates, parties, and other PACs. In addition, corporate PACs may not knowingly accept prohibited contributions, whether from persons who are foreign nationals or contributions in excess of the contribution limit.

**Practice Tips:**

- Coordinate with the Human Resources Department to identify individuals who should be included in the restricted class based on their responsibilities.
- Make efforts to exclude from the restricted class individuals who are not U.S. citizens or green card holders resident in the United States. The restricted class may include U.S. citizens living and working abroad for a foreign affiliate.
- Ensure the restricted class list is updated on a regular basis (such as prior to each solicitation) to reflect personnel changes, including new hires, promotions, or reorganizations.

**Twice-Yearly Solicitations to the Expanded Class:** Although it is administratively cumbersome, a corporation or its corporate PAC may solicit employees beyond the restricted class and their families in writing twice per year.

Prior to engaging in these solicitations, PACs must appoint a custodian to receive contributions to preserve anonymity for employees whose response will not be disclosed on FEC reports. The treasurer may serve as the custodian, provided that he preserves the anonymity of contributors, does not make decisions regarding the PAC’s making of contributions and expenditures, and continues to fulfill duties as treasurer. The custodian must deposit all contributions within 10 days of receipt and provide the PAC with recordkeeping information for reporting purposes, as discussed below. The custodian may not reveal information on non-contributors or small contributions of $50 or less, although the custodian should maintain these records for aggregating purposes.

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92 11 C.F.R. § 114.5(a)(1).
93 11 C.F.R. § 114.6(d).
94 If the custodian is not the treasurer, the custodian may not be a stockholder, officer or employee of the corporation or the PAC.
Once the custodian arrangement is in place, twice-yearly solicitations may be made. Employees in affiliate entities may also be solicited in a twice-year solicitation.\footnote{FEC Advisory Opinion 2004-32 (Spirit Airlines); FEC Advisory Opinion 1990-25 (Community Psychiatric Centers Federal PAC).} However, employees whose wages are not subject to income tax withholding may not be solicited.\footnote{11 C.F.R. § 114.6.}

The solicitation must be made in writing and mailed to the employee’s home address. The payroll deduction program may not be used to collect contributions in response to twice-per-year solicitations. In addition to the disclaimers required on all solicitations, twice-per-year solicitations must also notify the recipient of the custodian arrangement and that the anonymity will be maintained as to employees who elect not to make a contribution, make a single contribution of less than $50 or whose aggregate contributions are less than $200.\footnote{11 C.F.R. §§ 114.5(a)(5); 114.6(c).}

Member associations and trade associations may also establish a PAC and solicit certain employees of their members.\footnote{11 C.F.R. §§ 114.7; 114.8.} A trade association may only solicit certain employees after receiving approval from the member company.\footnote{11 C.F.R. § 114.8(c).} The trade association’s PAC may only solicit the employees of the entity that is a member—for example, if a parent is a member of the trade association, but its subsidiary is not, the trade association (or its PAC) may not solicit the subsidiary’s employees, and vice versa.\footnote{11 C.F.R. § 114.8(f).}

3.2 Contribution Limits and Restrictions

Broadly speaking, PACs may accept contributions from its employees, subject to dollar-limits, if those contributions are made voluntarily. PACs may not accept corporate funds or funds from foreign nationals.

PACs may receive up to $5,000 per year from any one contributor.\footnote{Note that each individual in a married couple has a separate $5,000 limit, even if only one spouse has an income. 11 C.F.R. § 110.1(i); FEC Advisory Opinion 2013-07 (Winslow II).} Affiliated PACs are subject to one $5,000 limit per individual.\footnote{11 C.F.R. § 110.1(d).} Contributions in cash are limited to $100 in the aggregate.\footnote{11 C.F.R. § 110.4(c)(1).}

All contributions received by the PAC must be made voluntarily—\textit{i.e.}, not as a result of “coercion.” That means that contributions cannot be secured by the use or threat of physical force, job discrimination or financial reprisal.\footnote{11 C.F.R. § 114.5(a)(1).} At the time of solicitation, the PAC must inform solicitees of the PAC’s political purpose and their right to refuse to contribute without reprisal.\footnote{11 C.F.R. § 114.5(a)(3)–(5).} If the PAC wishes to suggest a contribution amount, it must be careful to say that the suggested amount is only a suggestion, that more
or less than that amount may be given (i.e., there is not a minimum contribution), and the amount given or the refusal to give will not benefit or disadvantage the solicitee.\textsuperscript{106}

Whether a particular solicitation or method of soliciting is sufficiently voluntary can be a challenging determination and is highly dependent on the circumstances. Simply including a disclaimer (such as the example in Section 3.3) that the contribution is voluntary may not be sufficient to overcome other factors. For example, a “reverse check-off system” where the contributor must opt out of making contributions is not permitted as it violates the voluntariness requirement.\textsuperscript{107} For these reasons, legal and compliance personnel should consider the timing, frequency, relationship between the solicitor and the solicited party, and other factors when evaluating the text and circumstances of a solicitation. Even though there is no restriction on the number of times the restricted class may be solicited, corporate PACs must be careful to avoid situations in which individual employees feel compelled to contribute based on the frequency of solicitations or the timing, such as whether the request coincides with a review period or a discretionary compensation determination.

3.3 Content of a Solicitation

Every solicitation must include certain disclaimers, including a statement informing employees of the PAC’s political purpose and the right to refuse to contribute without reprisal.

To establish that a contribution was made voluntarily, PACs typically include a robust disclaimer, such as:

\begin{quote}
Your participation in the PAC is completely voluntary. The Company will not favor or disadvantage anyone’s employment because of a decision to participate, the amount of the contribution to the PAC, or a decision not to contribute at all.
\end{quote}

If the solicitation includes a guideline for contribution amounts or a suggested amount, a specific disclaimer relating to that issue is required and must clearly state that the guidelines or suggested amounts are merely suggestions, an individual may contribute more or less than suggested, and he or she will not be favored or disadvantaged based on the amount of their contribution or decision not to contribute.\textsuperscript{108} As noted above, while a proper disclaimer can also help to reduce risks that a communication would be viewed as coercive, it is important to carefully review all of a potential communication, and to remove language that is improper or could be misunderstood.

Best practice is to include other disclaimers in solicitations to assist with ensuring compliance with other obligations, such as limits and restrictions on contributions and reporting obligations. For example, solicitations typically include language to assist with reporting obligations:

\begin{footnotes}
\footnotetext[106]{11 C.F.R. § 114.5(a)(2); (5).}
\footnotetext[107]{FEC Advisory Opinion 2001-04 (Morgan Stanley Dean Witter & Co. PAC).}
\footnotetext[108]{11 C.F.R. §§ 114.5(a)(2); (5).}
\end{footnotes}
Federal law requires the PAC to use its best efforts to collect and report the name, mailing address, occupation, and employer for each individual whose aggregate contributions are in excess of $200 in a calendar year.

Solicitations also might include notice that Federal law prohibits the receipt of contributions from foreign nationals, corporations, in excess of $5,000 from an individual. PACs also often include a notice that Federal law prohibits the reimbursement of contributions made to the PAC.

In addition, the IRS Code requires that certain PACs include in solicitations directed to more than 10 people an express statement that contributions to the PAC are not deductible as charitable contributions for federal income tax purposes. 109

One common issue that arises for a PAC is the fact that the FEC has interpreted “solicitation” broadly. This means that communications that discuss the PAC might be required to have the requisite disclaimers, even if the communication was not intended to be a solicitation. For example, consider whether employee newsletters, annual reports or intranet content that discuss PAC activities could be treated as a solicitation.

A communication need not contain a specific request for a contribution to be treated as a solicitation. A communication would be considered a solicitation if it encourages readers to support the PAC’s activities or facilitates making contributions to the PAC.110 For example, an article in an internal newsletter that states the amount of money raised by the PAC and the number of employees who participated in the PAC’s activities, as well as a quote from the PAC’s chairman encouraging donations, is considered a solicitation.111

By contrast, the FEC has found that information on a corporation’s government relations site, which is accessible to employees of that corporation, that refers to the fact that the corporation supports its PAC and describes generally the functions of the PAC, but states only that employees desiring additional information on their eligibility or about the PAC’s activities may contact the PAC would not be considered a solicitation because it does not encourage contributions.112

These are fine lines and in practice the distinctions can be difficult to execute. Best practice is to review communications that discuss the PAC, such as employee newsletters, annual reports or intranet content that discusses PAC activities and determine whether it could be viewed as a solicitation and whether disclaimers are required or the language can be altered to ensure it is not a solicitation.

111 See FEC Advisory Opinion 1979-13 (Raymond International Inc. Employees’ PAC), at 2 (“The legislative history of the Act indicates that informing persons of a fundraising activity is considered a solicitation.”)
112 See FEC Advisory Opinion 2000-07 (Alcatel USA), at 5.
### Practice Tips:

- All written solicitations should be pre-approved by Legal or Compliance personnel to ensure necessary content is included and to ensure the language could not be construed as being coercive.

- In addition, internal communications that discuss the PAC or its activities should be cleared through Legal or Compliance personnel to ensure they do not contain an inadvertent solicitation.

- Consider using pre-approved scripts for verbal solicitations.

- Consider limiting one-on-one in-person solicitations.

- In the pre-approval process for solicitations, in addition to the content, consider whether other factors may create the appearance of coercion, such as the solicitor and solicitee relationship and the timing of the solicitation.

### 3.4 Methods That May Be Used to Obtain and Encourage Contributions

**Payroll Deduction Programs:**

The PAC may institute a payroll deduction program, which allows members of the restricted class to select an amount of contribution to make that comes directly from his or her paycheck. Under such a plan, each employee must demonstrate specific and voluntary donor intent. The most common method to obtain a record of voluntary donor intent is to use a signed authorization form, but other types of records may also be permitted. The PAC must retain a copy of the record for three years from the date of the report including the last contribution made by the individual.

Multi-national corporations may implement a payroll deduction program at foreign affiliate entities and, in some cases, foreign franchisees, to allow U.S. citizens living and working abroad to more easily contribute to the corporate PAC. The foreign entity may pay for the expenses in connection with

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113 FEC Advisory Opinion 1999-03 (Microsoft PAC).
114 Statement of Policy; Recordkeeping Requirements for Payroll Deduction Authorizations, 71 Fed. Reg. 38,513 (July 7, 2006); see also FEC Advisory Opinion 2013-12 (SEIU and SEIU COPE).
115 FEC Advisory Opinion 1982-34 (Sonat) (with respect to overseas subsidiaries); FEC Advisory Opinion 1992-7 (H&R Block) (with respect to overseas franchisees).
establishing and maintaining the payroll deduction program abroad, as long as no foreign national is involved in decision-making related to the PAC’s activities.\footnote{116} When the corporation is involved in facilitating the payroll deduction program, it is acting as the PAC’s collecting agent and must comply with certain obligations. The collecting agent must keep records on contributors to provide to the PAC for disclosure purposes. The collecting agent must also forward the collected contributions, along with the required recordkeeping, to the PAC. Individual contributions of $50 or less must be forwarded within 30 days; contributions exceeding $50 must be forwarded within 10 days.\footnote{117}

**Incentive Programs**

The corporation may encourage participation in its PAC with incentive programs, such as holding raffles, matching contributions to the PAC with charitable contributions, providing tokens of appreciation, such as plaques, and hosting events with prizes and/or entertainment including dances and parties.\footnote{118} For example, a corporation can have a raffle for a prize such as a gift basket to benefit the PAC so long as state law permits and the prize is not disproportionately valuable. As with all other solicitations, contributions through such a raffle or other fundraiser must be voluntary. The expenses related to these incentive programs may be paid by the corporation, but the PAC should reimburse the corporation for costs in excess of one-third of the money contributed.\footnote{119}

Voluntary contributions to the PAC from eligible employees may be matched by the corporation with a donation to a charity, as long as an individual contributor to the PAC does not receive a financial, tax, or other tangible benefit from either the corporation or the recipient charity. For example, the individual cannot receive the tax benefit of the charitable contribution made by the corporation as a “match” for the individual’s contribution to the PAC.\footnote{120} The costs associated with such matching programs are permissible solicitation expenses. Contributions may be matched with charitable donations on a one-to-one basis and even two-to-one “matching” has been deemed to not create an impermissible benefit to the contributor and not coercive.\footnote{121}

\footnote{116} Id.
\footnote{117} 11 C.F.R. § 102.8(b).
\footnote{118} 11 C.F.R. § 114.5(b)(2); see also, e.g., FEC Advisory Opinion 2003-33 (Anheuser-Busch Companies, Inc.); FEC Advisory Opinion 2003-4 (Freeport-McMoRan); FEC Advisory Opinion 1994-7 (GEON PAC); FEC Advisory Opinion 1994-6 (Coors PAC).
\footnote{119} Id.
\footnote{120} See, e.g., FEC Advisory Opinion 1994-7 (GEON PAC).
\footnote{121} MUR 6873 (WalMart).
Module 4:

Federal Campaign Finance Law Issues for U.S. Subsidiaries of Foreign Corporates

In addition to the obligations discussed in the prior section, corporations with foreign entities in the corporate family may be subject to heightened restrictions. These obligations derive from the ban on participation by foreign nationals (individuals and corporations) in U.S. elections. FECA prohibits contributions, donations, expenditures and disbursements solicited, directed, received or made directly or indirectly by or from foreign nationals in connection with any federal, state or local election. The prohibition includes acting as a conduit or intermediary for foreign national contributions and donations. Permanent residents (green card holders) living in the U.S. are not considered foreign nationals for the purpose of this prohibition.

These foreign national restrictions and prohibitions apply equally to state and local elections, where direct contributions to candidates by U.S. corporations may be permitted. A U.S. corporate entity that seeks to make contributions in state or local elections where permitted must ensure that the funds are not derived from foreign sources (such as the foreign parent or any foreign affiliates) and must ensure that individual foreign nationals are not involved in any way in the making of a contribution to a non-federal candidate, party or PAC.

4.1 Key Restrictions on Foreign Parent Involvement in its U.S. Subsidiary’s PAC

Despite the foreign national prohibition, a U.S. subsidiary of a foreign corporation may establish a PAC. Broadly speaking, the foreign national ban results in four instances where such a U.S. subsidiary’s PAC is more restricted than other corporate PACs:

(a) No financing of the PAC’s activities by the foreign parent;
(b) No foreign national control or influence over the PAC’s activities;
(c) No foreign national may make a contribution to the PAC; and
(d) No person may solicit contributions from a foreign national.

With respect to financing the PAC’s activities, the foreign parent (and any other foreign entity) may not finance the establishment, administration, fundraising or solicitation costs of the PAC. As a result, all PAC expenses must be derived from funds generated by the subsidiary. If the corporation can demonstrate through a generally accepted accounting method that it had sufficient funds from

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122 52 U.S.C. § 30121. Foreign nationals may make disbursements to influence ballot issues, including making contributions to a ballot committee, as long as that committee has not coordinated its efforts with a candidate’s committee. FEC MUR 6678 (MindGeek USA, Inc.).
123 For purposes of the foreign national prohibition, the Commission has interpreted the definition of “donation” as “essentially equivalent” to the definition of “contribution.” FEC Advisory Opinion 2014-20 (Make Your Laws PAC).
124 52 U.S.C. § 30121; 11 C.F.R. §§ 110.20(f); 300.2(d).
domestically-generated revenue to make the election-related expenses, the expenses will not be treated as deriving from a foreign source. Abiding by this requirement may be further complicated where complex intercompany transactions or sharing of back-office functions and expenses occurs between parent and subsidiary corporations. For example, if the parent is providing a cash infusion to the subsidiary, it should be clear that the payment is not subsidizing PAC activities.\textsuperscript{125}

With respect to foreign national direction or control, it is imperative that the individuals involved in the PAC’s administration are all U.S. citizens or permanent residents. In particular, foreign nationals should not be involved in the decision-making process as to the selection of candidates or PACs to whom the corporate PAC will make contributions. Thus, the involvement of the Board of Directors of the foreign parent should be limited to making broad policy decisions, such as whether to establish or terminate the PAC and setting a “not-to-exceed” budget for political activities.\textsuperscript{126} To insulate the activities of the PAC from the influence of foreign nationals, the U.S. subsidiary may establish a “Special Committee” consisting of non-foreign nationals to oversee and manage the PAC, including making decisions about the candidates that the PAC will support.\textsuperscript{127}

While it can be relatively straightforward from an administrative standpoint to exclude foreign nationals from decisions relating to contributions made by the PAC, other aspects of potential direction or control can be more administratively challenging. The FEC only requires that the approach to accomplish the lack of direction or control with respect to supervision must be reasonable. It is incumbent upon each corporation to select a reasonable method for its own operations.

Among other issues, the corporation should consider the supervision and discretionary compensation decision-making process for employees whose responsibilities includes PAC functions to ensure that a foreign national is not indirectly supervising PAC operations or rewarding (or punishing) an employee for their decisions related to the PAC. The FEC does not specify the exact method that a corporation must use to avoid improper supervision by a foreign national, only that a reasonable approach should be followed.\textsuperscript{128}

Lastly, the PAC may not solicit or accept contributions from a foreign national. A number of controls are often used to ensure such contributions are avoided. First, a contribution solicitation may include a disclaimer stating that contributions from foreign nationals are prohibited. Second, the donor card or payroll authorization form will require the contributor provide a home mailing address, which will help to identify potential foreign contributions. Third, the PAC administrators often work closely with Human Resources personnel to ensure that PAC solicitations are not sent to individuals who are likely to be foreign nationals. Such efforts may also be coordinated through departments that handle visa requests and the company’s immigration lawyers. Fourth, if the PAC administrators receive a contribution that is potentially suspect, i.e., the contributor’s home or office address is abroad, the PAC

\textsuperscript{125} FEC Advisory Opinion 1992-16 (Nansay Hawaii).
\textsuperscript{126} FEC Advisory Opinion 2000-17 (Extendicare PAC).
\textsuperscript{127} Id.
\textsuperscript{128} Id.
should make “best efforts” to confirm the legality of the contribution by asking the contributor or refund the contribution within 30 days.\textsuperscript{129}

4.2 **Limited Exceptions for Foreign National Volunteers and U.S. Citizens Living Abroad**

The foreign national ban does not affect the ability of a U.S. citizen living abroad to participate in the PAC or political activities. Those individuals are free to contribute to the PAC and any other U.S. campaign. As a consequence, multi-national corporations may implement a payroll deduction program at its foreign affiliate entities to allow U.S. citizens living and working abroad to more easily contribute to the corporate PAC.\textsuperscript{130} The foreign entity may pay for the expenses in connection with establishing and maintaining the payroll deduction program abroad, as long as no foreign national is involved in decision-making related to the PAC’s activities.\textsuperscript{131}

The foreign national ban also does not prevent a foreign national from volunteering on behalf of a candidate or political committee, subject to certain limitations.\textsuperscript{132} The candidate or PAC may accept such volunteer services, as well as any benefits that result directly and exclusively from those services without violating the foreign national ban or requiring any disclosure obligation.\textsuperscript{133} As with U.S. volunteers, the exception only applies if the individual’s time or services are not otherwise reimbursed by another person.\textsuperscript{134} For example, when an employee volunteers, the individual’s time should not be compensated by the company and any expenses incurred in connection with the volunteer activity should not be paid by the company.

4.3 **What Oversight Can a Foreign Parent Exercise Over the PAC of its U.S. Subsidiary?**

As a matter of good corporate governance and reputational risk management, the foreign parent may seek to exercise some oversight over the U.S. subsidiary’s political activity and the PAC. There are some limited actions the parent may take without running afoul of the restrictions on foreign nationals.

For example, the FEC has said that a Board of Directors of a foreign-owned U.S. company that includes non-U.S. persons may nonetheless engage in “general corporate policy decisions” such as whether to establish or terminate the PAC and may set a “not-to-exceed” budget for political activities. Foreign members of the Board of Directors may also decide whether to establish a Special Committee of U.S. nationals to oversee the political activities and determine the appropriate composition of that committee, as long as no foreign nationals are placed on the committee. Finally, the Board may exercise normal corporate procedures to ensure that the PAC does not exceed its “not-to-exceed” budget.\textsuperscript{135} Please note that your specific circumstances may vary and these are complicated issues—legal and reputational risk analysis should be conducted prior to engaging in any of these activities.

\textsuperscript{129} 11 C.F.R. § 103.3(b)(1).
\textsuperscript{130} FEC Advisory Opinion 1982-34 (Sonat).
\textsuperscript{131} Id.
\textsuperscript{132} 52 U.S.C. § 30101(8)(B)(i); 11 C.F.R. § 100.74; see also, e.g, FEC Advisory Opinion 2004-26 (Weller); FEC Advisory Opinion 2007-22 (Hurysz).
\textsuperscript{133} FEC Advisory Opinion 2014-20 (Make Your Laws PAC).
\textsuperscript{134} 11 C.F.R. § 100.74.
\textsuperscript{135} FEC Advisory Opinion 2000-17 (Extendicare PAC), FEC Advisory Opinion 2006-15 (TransCanada).
Key Takeaways for Parent Oversight Over PAC Activities:

- A foreign parent may not:
  - Direct or suggest candidates to whom the PAC should contribute or amounts for such contributions or candidates that the PAC should endorse or host a fundraising event.
  - Allow a foreign national to be a PAC Board Member, administrator or to have direct or indirect oversight over the PAC’s activities.
  - Allow a foreign national to supervise PAC administrators and decision-makers in connection with their PAC activities.
Module 5: Seeking Clarity in an Uncertain World: Advisory Opinions

Many campaign finance laws and regulations were drafted decades ago and can be challenging to apply to new technologies and in the wake of upheaval in the courts with respect to campaign finance laws. Where ambiguities exist or consideration should be given to broadening an existing exception, a PAC may opt to seek an advisory opinion to determine the FEC’s view as to how to apply the law to a particular set of circumstances.\(^\text{136}\)

Corporations and their PACs most commonly seek advisory opinions with respect to how and from whom the PAC can raise money. For example, advisory opinions are often sought to answer such questions as who may be treated as members of the solicitable restricted class, which corporate family entities may be solicited, the operations of incentive programs to encourage contributions, and the operation of payroll deduction programs and the necessary record-keeping obligations. In addition, when corporate restructurings occur or circumstances change over time, corporations and their PACs may seek an advisory opinion from the FEC to determine whether PACs in the corporate family should be treated as affiliated or could be permitted to “disaffiliate.”

5.1 Advisory Opinion Process

When filing an advisory opinion request, the requestor typically will engage with the Office of General Counsel’s Policy Division staff to ensure the request is complete and includes the facts the staff believe are necessary to resolve the legal question. Although not required, it is helpful to have an experienced attorney interact with the Policy Division staff during this phase.

Once the request is considered complete, the staff will draft an advisory opinion for the FEC’s consideration. Commissioners may also draft their own advisory opinions for consideration, which frequently results in competing drafts. An advisory opinion will be placed on the agenda for consideration during a public hearing and any drafts will be made public to allow the requestor or any member of the public to comment on the drafts. Often, the timeframe between making the drafts public and the FEC hearing is quite short and the requestor will have to act quickly to provide comments. The requestor and their counsel may also appear at the hearing to present their view of the issues and respond to questions from Commissioners.

Although the statute requires that the FEC issue an opinion within 60 days of receipt, in practice, receiving a response to an advisory opinion request may require additional time.\(^\text{137}\) Thus, a prospective requestor should consider the potential timeline and plan for that in scheduling their proposed activities.

There are some limitations on the circumstances under which an advisory opinion can be sought. It cannot be done anonymously, on a no-names basis or confidentially. The fact pattern must be

\(^{136}\) 52 U.S.C. § 30108.
\(^{137}\) 52 U.S.C. § 30108(a).
sufficiently specific and also prospective. One cannot seek an advisory opinion for conduct that has already occurred in the expectation of obtaining relief from an enforcement proceeding. However, if the advisory opinion is sought in advance and relief is obtained, the requestor may rely on that opinion in any subsequent enforcement for any conduct that is indistinguishable in all material aspects from that described in the request.\footnote{52 U.S.C. § 30108(c)(1)(B).} However, if the law changes after the advisory opinion is obtained, this protection may no longer apply.

5.2 Considerations When Determining Whether to Request an Advisory Opinion

In light of the process and limitations, it is important to carefully consider whether to seek an advisory opinion and to be aware of the consequences once such relief is sought. The company’s name and proposed activities will need to be described in detail, all of which will become publicly available. The process may be lengthy and relief may not be obtained prior to when the requestor seeks to engage in the proposed activity. The opinion will not apply to conduct that has already occurred, but rather will only provide legal protection for future conduct that is materially the same as that described in the request.

Key Takeaways on Advisory Opinions:

- Requests cannot be anonymous—rather, they will be made public.
- Requests cannot be based on past conduct.
- Requests must be factually specific as to the proposed conduct.
- Plan ahead: the process can be lengthy so ensure you allow enough time for resolution before you plan to conduct the proposed activity.
- Future reliance on the opinion is limited to the exact same conduct; accordingly, how you frame the conduct in the request is very important.
Module 6:
Interacting with and Getting to Know the Reports Analysis Division

For PACs, the most common or frequent interaction with the FEC is likely to be with the FEC’s Reports Analysis Division (“RAD”). RAD is responsible for reviewing reports filed with the FEC. Note that most reports must be filed when due, even if there is no activity to report. If RAD identifies a potential error, omission or potentially prohibited activity in a report, or that reports are missing or not timely filed, RAD may send a “Request for Additional Information” (“RFAI”) to the PAC. Sometimes the RFAI only seeks additional information to ensure the accuracy of the information reported to the public.

6.1 Requests for Additional Information

The decision as to whether to send an RFAI is applied based on the application of threshold criteria (i.e., is a similar apparent error repeated in a certain percentage of contributions or over a certain dollar threshold) on a per report basis. Thus, errors that are repeated across multiple reports are not accrued to reach the threshold. The FEC approves new thresholds every two-year election cycle.

The PAC has 35 days to respond to an RFAI. This is an opportunity for the PAC to correct or amend any discrepancies in the filings. The PAC should have procedures in place to ensure that RFAIs are timely received, tracked, and provided attention to ensure a timely response. A PAC may respond to an RFAI either by filing an amended report or by filing a narrative response. Amendments can be complicated and take time to complete accurately, so it is important to evaluate the RFAI as soon as it is received. Not only are the PAC’s reports all made public, RFAIs and responses to RFAIs are also publicly available on the FEC’s website.

RAD may refer an inadequate RFAI response to one of the following for further action—the Office of General Counsel’s Enforcement Division, the Audit Division, ADR or Administrative Fines (all discussed in greater detail below). Timely, accurate, and fulsome responses to RAD will benefit the PAC in a subsequent matter.

6.2 RAD as a Compliance Resource

PACs, Treasurers, compliance personnel, and attorneys are encouraged to contact RAD with questions and to seek guidance with respect to any report filing issues in advance of making a filing. RAD can be a useful resource to prevent a reporting violation and it cannot hurt to have established a rapport with your assigned RAD analyst. However, it is important to keep in mind that RAD staff create and maintain records of those calls. Such calls may be relied upon in subsequent enforcement matters or audits. Accordingly, depending on the nature of the question, you may consider discussing the issue with counsel before calling RAD with a reporting question.
Practice Tips:

• Call your RAD analyst with reporting questions, but consider that those conversations are documented.

• Always respond in a timely manner to an RFAI—if the PAC has a process in place for responding to RFAIs, late responses can be avoided.
Module 7:

Tips for an FEC Audit – Not Your Usual Audit

Corporations are accustomed to being subject to audits, whether internally, externally or by government regulators. Like an SEC or FINRA exam, the FEC’s audits are intended to determine compliance with applicable laws. FEC audits are complicated, time-consuming, and partially conducted in the public eye. The best strategy to minimize the risk of an FEC audit is to file complete and accurate reports. Audits are triggered on the basis of the number of “points” or issues that appear based on a review of a PAC’s reports. Reports that are filed late or that omit required information, may trigger “points,” particularly where a response to an RFAI was not sufficient. The FEC dedicates much of its audit resources to candidate and party committees, but corporate PACs may find themselves subject to an audit if their activity exceeds the relevant thresholds. Once in the audit process, the PAC should consider retaining counsel to negotiate the complicated process and take advantage of early opportunities to present the PAC’s viewpoint and potentially narrow the scope of the audit.

Even if a reporting issue caused the audit, the scope of the audit is likely to be broader and will test the PAC’s compliance with many PAC obligations, including its solicitation and adherence to soliciting the restricted class, and record retention.

In one matter in which the FEC initiated an audit against a PAC, the FEC found that:

(a) several solicitations failed to include appropriate language that contributions were voluntary;

(b) prohibited corporate and foreign national contributions were received; and

(c) the reports filed with the FEC were inaccurate.\(^\text{139}\)

Upon conclusion of a lengthy audit, the matter was referred to OGC for further enforcement. There, the PAC agreed to:

(a) pay a $300,000 civil penalty;

(b) disgorge almost $20,000 in contributions to the U.S. Treasury; and

(c) return more than $580,000 to contributors.

In addition, the PAC filed amended FEC reports, amended its compliance procedures, and communicated with all contributors who may have received the inadequate solicitations to remind them of the voluntary nature of contributions. Even though the audit only related to activity during 2003 and 2004, the enforcement matter ultimately covered activity from 2003 through 2007 and was not resolved until 2010.

\(^\text{139}\) FEC MUR 6129 (ARDA-ROC PAC); Audit Referral 08-03 (ARDA-ROC PAC).
7.1 What is an FEC Audit?

FEC audits are “enforcement-minded audits” to determine whether a committee substantially complied with FECA. An audit is most likely to be launched on the basis of incorrect reporting that RAD identifies and refers to the auditors. Thus, filing accurate and complete reports is the best strategy to avoid an audit. Even though the audit may be launched based on apparent misreporting, the scope of the audit for a corporate PAC is likely to be more wide-ranging. The audit will compare bank accounts and other records to the reports filed, but will also seek to determine whether the PAC complies with its other legal obligations. The audit is likely to review solicitations to ensure the appropriate disclaimers are included, whether those solicitations were targeted to the restricted class, whether contributions were made voluntarily, and the procedures that are followed to ensure that excessive and prohibited contributions, such as those from foreign nationals, are not received. Thus, questions of law often arise in the course of an FEC audit. The PAC’s approach to an FEC audit should take into account the broad nature of an FEC audit.

7.2 The Audit Process

An audit is only launched once four Commissioners vote to commence an audit. Audits cover a two-year period beginning January 1 of the year before the election and ending December 31 of the election year.

The first step in an audit is that a PAC will receive notification of the audit, a request for materials, and a designation of counsel form. The PAC may choose to appoint external counsel to represent the PAC in the audit at that time. Although not required, experienced counsel can help to negotiate the process and address the legal questions that inevitably arise in the course of an FEC audit.

Audits include a fieldwork component, which is typically conducted on site at the PAC’s office, but PACs may suggest an alternative location. For example, if the PAC has retained counsel, the audit might be conducted at counsel’s office. This might be particularly useful if counsel is based in Washington, D.C., where the FEC is located, and the PAC is located elsewhere. The fieldwork commences with an entrance conference and concludes with an exit conference with the auditors. At the exit conference, the auditors explain their work, results, and the findings they expect to present to the FEC. During this phase PACs are encouraged to resolve as many issues as possible directly with the auditors.

7.3 The Importance of Creating and Maintaining Records

The PAC’s adherence to record retention obligations and the accessibility of those records will be tested in an audit. The auditors will conduct an inventory of the PAC’s records and determine whether any records are missing. The PAC may need to explain its view as to why the records are not legally required.

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140 The Commission may audit a committee if its reports do not meet the threshold requirements for substantial compliance with the FECA. 52 U.S.C. § 30111(b).
142 Id. at 1.
or do not exist. It is not uncommon for the audit staff to note in its report whether it received information sought (including whether there was significant delay in receiving records or whether the information provided was incomplete), and whether the PAC’s failure to maintain or provide documents impeded the audit. Thus, it is important to ensure that the PAC’s procedures contain the necessary record-keeping obligations and that those procedures are routinely followed.

The adequacy of record-keeping may also affect the length of the audit. The amount of time required for fieldwork will depend in part upon the manner in which the records are maintained and whether those records are complete. If the PAC’s records are substantially complete, fieldwork is typically completed within two to three weeks.143

7.4 Opportunities to Respond to Auditors’ Views and Present the PAC’s Views

The FEC’s audit process subsequent to field work is lengthy and occurs in multiple stages that may feel somewhat repetitive. After the exit conference, PACs have 10 business days to submit materials to the auditors to demonstrate that a potential finding is not warranted. If successful, a potential finding will not appear in the audit report.144 This is an important stage to attempt to narrow the scope of findings before the process advances and positions are more entrenched. An audited PAC will also have the opportunity to respond in writing to the Staff’s Interim Audit Report, Draft Final Audit Report, and Proposed Final Audit Report. The PAC can also request a hearing before the FEC adopts the Final Audit Report, which can be approved with the vote of only two Commissioners and are routinely granted.145 Unlike enforcement proceedings that are confidential until after they are resolved, audit hearings are public. At the hearing, the PAC (typically through counsel) may make oral arguments and ask questions.146

Often the FEC conducts further deliberation in public meetings of issues raised by the PAC before approving the Final Audit Report. In addition, the documents upon which the FEC is voting (such as the audit reports) are made public in advance of the public meeting. Once the FEC approves the Final Audit Report, the report is sent to the PAC and placed on the FEC’s website along with PAC responses and other documents related to the audit.147

After the FEC approves the Final Audit Report, certain matters may be referred to the Office of General Counsel or the Alternative Dispute Resolution Office for additional enforcement action. The PAC will have additional opportunities to respond to the issues raised in those contexts.148 By involving counsel and resolving issues during the audit process, PACs may be able to avoid or limit the number of issues referred from the Audit Division to an enforcement process.

143 Id.
144 Id. at 1, 4.
146 Id.
147 FEC Audit Process, at 2.
148 Id. at 4.
Module 8:
How to Handle an FEC Enforcement Matter

The FEC’s reputation for obtaining robust penalties through enforcement may not be as strong as other federal regulators, but the risks are important to consider due to the fact that complaints may be filed by anyone and the FEC is required to address every properly filed complaint as well as the fact that all materials are likely to become publicly available for media scrutiny.

To reiterate, any individual can file a complaint against anyone for alleged violations of federal campaign finance laws. A disgruntled employee, a former employee, a whistleblower, a reform organization or political opponent could each file a complaint. Complaints may be brought against the PAC, the corporation, corporate executives, the PAC treasurer, or even contributors. The complainant may make the complaint public in an attempt to garner public attention to the alleged conduct. Upon conclusion of a matter, the complaint, responses, and other FEC documents demonstrating the Office of General Counsel’s fact-finding and legal analysis will all be made public, subject to limited redactions designed to protect the Commission’s enforcement process.

In addition, in many instances, a corporation and its PAC identifies a potential violation of federal campaign finance laws and seeks to obtain cooperation credit from the FEC by conducting an investigation and reporting the activity proactively. The FEC has a policy to provide those who self-report with meaningful reductions in penalties.

The FEC’s enforcement process occurs in many stages and can be quite lengthy. The various stages provide a respondent multiple opportunities to make the case against enforcement or the imposition of a penalty. If a corporation, PAC, treasurer or executive is a party to an FEC enforcement matter, an understanding of the process is essential. The process is addressed in Section 8.4 below.

8.1 Commencement of a Matter

An enforcement matter may be initiated by any person filing a complaint, a referral from within the FEC or from another regulator or voluntarily through a self-report to the FEC.

- **Complaints**: OGC’s enforcement process is most frequently initiated by a person or entity filing a complaint with the FEC. Given that anyone can file a complaint alleging violations of federal campaign finance laws, complaints could be filed by a current or former employee, a whistleblower, candidate or party associated with an electoral opponent, or a so-called “reform group,” which are non-profit organizations whose purpose is to reform campaign finance or highlight concerns regarding government ethics.

- **Referrals**: Matters are also initiated by referral, either externally from another government agency, such as the Department of Justice or a state attorney general or state regulator or internally from the FEC’s own Audit Division or Reports Analysis Division.
- **Self-Report**: Some matters are initiated by a voluntary submission submitted by persons or entities that may have violated federal campaign finance laws. The benefit of self-reporting is the potential for leniency in the penalty process and to expedite the investigation process to reach a conclusion more quickly.\(^{149}\)

### 8.2 Self-Reporting

The FEC has adopted a policy to encourage complete and timely self-reporting.\(^{150}\) The reward for self-reporting is that the FEC often allows penalties that are 25-75% lower than those for comparable matters that are not self-reported.\(^{151}\) The FEC will grant a 50% penalty reduction to respondents who report potential violations before discovery by an outside party, immediately cease and promptly report the violation to the FEC upon discovery, take appropriate and prompt corrective actions, amend reports or disclosures, make or waive any appropriate refunds, transfers, and disgorgements, and fully cooperate with the FEC to ensure the *sua sponte* submission is complete and accurate.\(^{152}\) In addition, the FEC may grant a civil penalty reduction of up to 75% if the respondent meets the criteria for a 50% reduction and the violation was uncovered through a comprehensive investigation or audit initiated by the respondent. To receive this heightened reduction, the respondent must provide all documentation of the expert’s review to the FEC.\(^{153}\)

In addition to a reduction in penalties, a party may seek a “fast track” settlement.\(^{154}\) If the individual or entity self-reporting the issue conducts an internal investigation and provides the FEC with sufficient facts and information, there is a possibility that an investigation will not be necessary. This will minimize the inconvenience of responding to an investigation and shorten the length of time to resolve the matter.

If you have identified potential violations of federal campaign finance laws or regulations, you should give consideration to whether to self-report. Enforcement actions often result in the payment of civil penalties, as well as remediation efforts. Conducting these efforts yourself and doing so early on can help reduce the penalties, the length of time that the enforcement matter will linger, and the scope of the issues or remediation efforts. We discuss these considerations in greater length in Module 10.

### 8.3 Confidentiality and Public Record for Enforcement Matters

The FEC is required by law to keep its actions regarding MURs confidential until after the matter is closed.\(^{155}\) However, the complainant may make the complaint public at any time.\(^{156}\) Some complainants

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\(^{151}\) OGC Enforcement Manual ¶ 3.3; *see also* Self-Reporting Policy, at 16697.

\(^{152}\) Self-Reporting Policy, at 16697.

\(^{153}\) Id.

\(^{154}\) FEC Enforcement Guidebook, at 9.

\(^{155}\) 52 U.S.C. § 30109.
issue press releases regarding the complaint filed on the same day the complaint is filed with the FEC. Redacted files for closed enforcement matters are made available to the public within 30 days after the entire matter has been closed (although in practice this may take longer). The materials that a respondent provides to the FEC in a *sua sponte* submission or in response to a complaint will become public, as will any conciliation agreement. The FEC will redact materials that are made public, but in the usual course, the redactions are designed to protect the integrity of the enforcement process, not to protect the respondent’s internal information or business secrets. Respondents should take care to make robust and complete submissions to the FEC, but ensure the information is appropriate for the public domain or take care to protect that information.

### 8.4 Enforcement Process from the Respondent’s Perspective

Individuals, PACs, corporations and other entities that are named in the complaint or initiating document are referred to as respondents. Before any matter is resolved through settlement or the assessment of penalties, there are a number of procedural safeguards for respondents. Throughout the process, four votes of the Commissioners are needed to proceed to a subsequent enforcement stage. The process is designed to encourage voluntary settlement.

Most cases are resolved in a voluntary settlement, which typically requires that the respondent pay a civil monetary fine and agree to certain remediation measures, such as the filing of amended reports, revising policies and procedures, attending FEC training sessions, or similar efforts. In the event that the respondent does not agree to a voluntary settlement with the FEC, the FEC may decide to sue the respondent in federal court to seek a penalty, although few cases proceed to this stage.

#### Notice and Response

OGC will send a respondent notice of a complaint within 5 days of receipt of a properly filed complaint, as well as a letter describing the procedures and a designation of counsel form. At this point in time, respondents should establish a document hold and suspend the usual document destruction policies to ensure that relevant records are not destroyed unwittingly. Criminal penalties may attach for knowingly destroying, altering or falsifying records in federal investigations.

In addition, respondents should consider whether to retain counsel. This decision should be made expeditiously as a response will be due within 15 days of the date of notification. If multiple individuals or entities are named in the complaint, multiple counsel may be necessary if there is a potential for conflict between the respondents. The Response is the respondent’s first opportunity to demonstrate why the FEC should not pursue an enforcement matter. As this will frame the issues for OGC and

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156 FEC Enforcement Guidebook, at 22.
159 See id. at 70428; see also OGC Enforcement Manual ¶ 8.2.2.
162 52 U.S.C. § 30109(a). Extensions of time are routinely granted.
163 *Id.*
the FEC and may assist in narrowing or eliminating the potential violations subject to an investigation, it is important to dedicate sufficient attention to ascertaining the relevant information and providing a robust response.

The FEC encourages respondents to respond with as much specificity as possible and to ensure that each allegation is addressed.\textsuperscript{164} Including sworn affidavits and other documentary evidence in support of the position is usually helpful.\textsuperscript{165}

During this phase, OGC may look to publicly available information, such as FEC reports, other disclosures filed with other agencies, a respondent’s website, newspaper articles, and even clips on YouTube. In addition, OGC may receive information from other law enforcement agencies.\textsuperscript{166} Although there has been some debate about the extent to which OGC should engage in such fact-finding prior to launching an investigation, respondents should expect that OGC is examining public sources.\textsuperscript{167} Often, a party’s own statements, in the press or on its own website, are the source of useful information for the FEC.

\textit{Reason to Believe}

Upon review of the complaint and response, OGC may recommend that the FEC open an investigation because there is “reason to believe” a violation has occurred.\textsuperscript{168} An investigation cannot commence without such a finding by four of the Commissioners.\textsuperscript{169} When the FEC approves a recommendation by OGC that it finds reason to believe, the respondent may submit additional factual or legal materials that the respondent believes are relevant for the FEC’s consideration or resolution of the matter.\textsuperscript{170} The FEC receives all responses and considers them when determining whether and how to proceed with an investigation or conciliation.

If the facts are largely uncontested and little investigation is required, OGC may also recommend that it be authorized to enter into “pre-probable cause conciliation,” which will allow OGC to negotiate with the respondent (or respondent’s counsel).\textsuperscript{171} If the FEC is able to resolve a matter at this early stage, the Respondent is typically awarded with a 25% reduction in the penalty because early settlements conserve FEC resources.\textsuperscript{172}

The FEC may exercise prosecutorial discretion and dismiss a matter if it does not merit further use of FEC resources.\textsuperscript{173} This analysis is based on factors such as the small dollar amount at issue, the insignificance of the alleged violation, the vagueness or weakness of the evidence or the merits of the

\textsuperscript{164} FEC Enforcement Guidebook, at 10.
\textsuperscript{165} Id.
\textsuperscript{166} OGC Enforcement Manual ¶ 3.4.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} 52 U.S.C. § 30109(a)(3).
\textsuperscript{171} OGC Enforcement Manual ¶ 6.1.1.1.
\textsuperscript{172} Id. ¶ 6.4.3.3.
\textsuperscript{173} Id. ¶ 4.4.3; \textit{Heckler v. Chaney}, 470 U.S. 821 (1985).
response, the respondent’s financial situation, or whether the facts at issue have been redressed in other legal proceedings, such as in a criminal matter.\textsuperscript{174}

\textit{Investigation}

The FEC may authorize an investigation upon finding reason to believe that a violation has occurred.\textsuperscript{175} This investigation is conducted by Enforcement Division staff through informal and formal methods, which may include subpoenas and orders for information, documents or depositions.\textsuperscript{176} Responses to subpoenas are generally due within 30 days of receipt of such subpoenas, but extensions may be granted.\textsuperscript{177}

\textit{Probable Cause Finding}

After the investigation is completed, or no pre-probable cause conciliation agreement is reached, OGC will notify the respondent if it intends to recommend that the FEC find probable cause to believe a violation has occurred.\textsuperscript{178} OGC will include with the notification a Probable Cause Brief stating OGC’s position on the factual and legal issues of the matter.\textsuperscript{179} The respondent then has 15 days from receipt of the brief to file a reply brief explaining their position.\textsuperscript{180} Respondents may also request a hearing to present oral arguments directly to the FEC before it votes on probable cause and a hearing request will be granted with the approval of only two Commissioners.\textsuperscript{181} Such requests are generally granted.

After the Probable Cause Briefs and Probable Cause Hearing, if any, OGC will provide a written notice to the FEC and respondent advising whether it intends to proceed with or to withdraw its recommendation to find probable cause.\textsuperscript{182} If this notice contains new facts or new legal arguments not previously contained in the Probable Cause Brief or raised by OGC at a Probable Cause Hearing, the respondent may request to address the new points raised in a Supplemental Reply Brief.\textsuperscript{183} Upon review of all OGC and respondent briefs, the FEC will then determine whether there is “probable cause to believe” that a violation has occurred; the case will be closed if the FEC does not obtain four affirmative votes.\textsuperscript{184}

If the FEC determines that there is probable cause to believe that knowing and willful violations occurred, it may refer such violations to the DOJ for possible criminal prosecution.\textsuperscript{185}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{175}] 52 U.S.C. § 30109(a)(2).
\item[\textsuperscript{176}] FEC Enforcement Guidebook, at 14.
\item[\textsuperscript{177}] Id.
\item[\textsuperscript{178}] 52 U.S.C. § 30109(a)(3)
\item[\textsuperscript{179}] Id.
\item[\textsuperscript{180}] Id.
\item[\textsuperscript{181}] OGC Enforcement Manual ¶ 7.5.1.
\item[\textsuperscript{182}] 11 C.F.R. § 111.16(d).
\item[\textsuperscript{183}] OGC Enforcement Manual ¶ 7.7.
\item[\textsuperscript{184}] Id. ¶ 7.8.
\item[\textsuperscript{185}] 52 U.S.C. § 30109(a)(5)(C).
\end{itemize}
\end{footnotesize}
Post-Probable Cause Conciliation

If the FEC determines that there is “probable cause to believe” a violation has occurred, the FEC must attempt to conciliate with the respondent for 30 to 90 days. If the FEC determines that there is “probable cause to believe” a violation has occurred, the FEC must attempt to conciliate with the respondent for 30 to 90 days. A FEC-approved proposed conciliation agreement will serve as the basis for settlement negotiations.

If OGC and the respondent enter into a conciliation agreement, the written agreement will become effective once it is approved by the affirmative vote of four Commissioners and signed by the respondent and the General Counsel. The FEC will close the matter once the signed conciliation agreement is approved. The conciliation agreement is a complete bar to any further action by the FEC based on the same facts, unless the respondent violates the conciliation agreement. Although rare, the FEC is authorized by statute to sue in federal court if the terms of a conciliation agreement have been violated by a respondent.

Suit Authority

If post-probable cause conciliation does not result in an agreement, OGC may recommend to the FEC that it authorize a civil action in federal court. If the FEC gives such authorization, by an affirmative vote of at least four members, the FEC will file suit in the U.S. District Court for the district in which the person against whom such action is being brought is found, resides or transacts business. The FEC may seek a variety of remedies, including an injunction, restraining order or civil penalty up to $5,000. The federal district court will review the facts of the matter de novo, enabling the court to rely on additional fact discovery by the parties. Such cases are relatively rare, because respondents are more likely to voluntarily conciliate cases with egregious facts and the FEC is less likely to authorize suit (or allow the matter to proceed at earlier stages of the enforcement process) where the likelihood of success is considered less certain.

Complainant’s Recourse

If a complainant disagrees with the FEC’s dismissal of a complaint, or any allegations contained therein, he or she may file a petition in the U.S. District Court for the District of Columbia within 60 days after the date of the dismissal. In addition, if the FEC does not act on a complaint within 120 days of filing, the complainant may file suit in the U.S. District Court for the District of Columbia. Thus,
even if the FEC agrees to dismiss a matter, there is the potential for judicial review and the FEC’s dismissal may not conclude the matter.

8.5 Overview of the Enforcement Process

As the following chart demonstrates, the FEC enforcement process for a MUR has many stages and familiarity with the various standards and opportunities to influence the process is key. The portions shared in blue demonstrate the multiple opportunities in the process where the respondent may inform the process and present the facts. The red portions indicate the points in the process at which a Commission vote is required.
8.6 Statute of Limitations

The FEC may only seek civil penalties in Federal district court within the five-year statute of limitation period, measured from the time of the violation.\(^{197}\)

8.7 Alternative Dispute Resolution/Administrative Fines

Some matters are handled outside the OGC’s enforcement process. For minor “traffic ticket” type violations, typically for reporting omissions and errors that are small in dollar amount or proportionally compared to the entity’s other activities, such matters may be resolved as an Administrative Fines matter.\(^{198}\) There is often less room to negotiate the appropriate penalty in such matters and the procedural steps and FEC interaction are markedly different than those matters handled by OGC’s Enforcement Division.

The FEC also has an Alternative Dispute Resolution process and these matters are also presented to the FEC for approval, but with a slightly different voting process. A matter is usually not included for ADR if there are facts in dispute or an investigation is required. The ADR process is designed to facilitate a faster resolution of the matter than a MUR. However, the respondents will be required to toll the statute of limitations while engaging in ADR negotiations.

The goal of ADR is primarily focused on preventing future violations. ADR matters regularly require some remedial actions to be taken by the respondent, such as to amend reports, conduct training or revise relevant policies and procedures. In contrast to a MUR, an ADR matter typically does not include a requirement to admit to violations or the payment of a civil penalty and the Commission will not make a finding that there is “reason to believe” a violation occurred.

8.8 Understanding the FEC’s Interactions and Cooperation with Other Regulators and Implications for Corporate PACs

As mentioned above, the DOJ has jurisdiction to bring criminal actions for violations of FECA that are alleged to be knowing and willful. The FEC may also pursue those matters to seek civil remedies. The FEC and DOJ may cooperate in an investigation or one may allow the other to conduct their investigation prior to the other. The FEC and DOJ currently operate under a Memorandum of Understanding that was entered into in 1978, although there have been repeated calls for a revision. Details of how the relationship operates aside, the important element to be aware of is that information can be shared between regulators—at the federal, state, and local level.

The FEC may elect to refer a matter or share information with DOJ or any other federal, state or local agency with jurisdiction over facts uncovered in the course of the FEC’s work. Similarly, another agency may refer a matter to the FEC for consideration. When dealing with any regulator, it is important to keep this fact in mind. Cooperation with one regulator may be viewed favorably by another. These

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\(^{198}\) FEC Enforcement Guidebook, at 24.
practices should be kept in mind whenever responding to a regulator’s request for documents, information or testimony.

In past years, the DOJ has been particularly focused on contributions in the name of another. In recent cycles, there have been criminal actions have been brought on these types of allegations. Sometimes those contributions were reimbursed by a corporation and/or a foreign national, resulting in multiple types of violations for the same activity.

<table>
<thead>
<tr>
<th>Key Takeaways for FEC Enforcement:</th>
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<tbody>
<tr>
<td>• Any individual, including a disgruntled or former employee, political opponent or campaign finance reform organization may file a complaint.</td>
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<td>• If a corporation or its PAC uncovers a potential violation, consider whether to conduct an investigation and self-report to the FEC to obtain significant reductions in a potential penalty or to avoid a finding altogether.</td>
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<tr>
<td>• The enforcement process is complex and it is important to take advantage of the opportunities provided to limit the scope or penalties connected to an enforcement matter.</td>
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<tr>
<td>• The complaint, responses, and internal FEC documents describing the case will all be made public and may be subject to media scrutiny.</td>
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Module 9:
Best Practices to Mitigate Campaign Finance Risk

In light of each of the legal requirements discussed in this Guide, a company that wants to be politically active and maintain a PAC must develop a comprehensive compliance program. This can be done by following a few core compliance principles, which can substantially mitigate regulatory, legal, and reputational risks associated with political activity. By applying these principles and taking a proactive approach to compliance, companies can attempt to avoid or mitigate the costs and reputational harm of being pulled into the FEC enforcement process.

Best Practices to Prevent FECA Violations:

- Consider the company’s risk profile based on political and business activity
- Adopt tailored, risk-based policies and procedures to address political law risks
- Fully implement the compliance program
  - Awareness program that includes regular trainings
  - Regular monitoring and testing
  - Certifications and representations
  - Compliance-oriented recordkeeping
- Regularly review the adequacy of your compliance program

9.1 Assess the Company’s Objectives and Risk Profile

To mitigate risk, one must first understand it. To do so, it important to understand the company’s existing and prospective political activity and business activity.

The first step is to develop a detailed understanding of the objectives for the company’s political activity. This can include, but is not limited to, a consideration of:
goals for the PAC, including the anticipated size of the PAC and number of potential contributors;

what the corporation is hoping to achieve through engaging with the electoral process;

the extent to which electoral engagement includes involvement with federal, state, and local elections (particular care should be taken where the company is subject to federal pay-to-play laws);

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the manner in which the PAC intends to fundraise and collect PAC contributions (payroll deduction; fundraising events; communications to the restricted class or outside the restricted class);

executive and other personnel’s involvement in the PAC’s operation, including fundraising efforts (senior executives, government relations, compliance, etc.);

the extent to which the corporation seeks to engage in the electoral process through means other than its PAC;

whether the PAC or principals of the firm are likely to be engaged in fundraising or hosting political events; and

whether the firm is likely to be involved with high-profile or controversial campaigns or activities that can be expected to attract public scrutiny.

The next step is to assess the company’s political law risk profile. To a large extent, this will be driven by the company’s structure, business activity, and objectives, but it is useful to consider a number of factors, such as:

the company’s structure;

the company’s business activities and geographical footprint;

the company’s level of risk tolerance;

the presence of foreign nationals, a foreign parent company or affiliated foreign entities;

the extent to which the company does business with government entities;

the structure of the compliance department;

how the company raises funds for the PAC;

the company’s public profile;
• the nature and extent of the company’s lobbying activities;

• whether the company’s political engagement is longstanding or relatively new;

• the degree to which the company’s political engagement is consistent with or different from that of peer firms; and

• the company’s overall compliance culture.

As noted above, particular characteristics—such as having a foreign parent company—are associated with specific legal and regulatory risks.

9.2 Adopt Tailored, Risk-Based Policies and Procedures to Address Risks

Once the initial assessment of the company’s objectives and risk profile is complete, the next step is to adopt political law policies that are tailored to address the company’s specific needs. While “off-the-shelf” or one-size-fits-all political law policies and procedures can be a useful starting point, in application they may be both under- or over-inclusive. Policies that are tailored to the company’s objectives and risks can significantly reduce the chance of a compliance breakdown.

There are a number of specific policies and procedures that politically engaged companies should consider adopting with respect to the establishment and operation of a corporate PAC, such as PAC by-laws, PAC procedures, PAC incorporation documents, and a PAC manual. Other policies and procedures relate to political activities undertaken by the firm’s officers and employees. These can include a political activities policy, a policy on the use of corporate resources on behalf of political actors, a policy on fundraising events and solicitations, and pay-to-play policies. Companies should also consider the need to deal with political law issues in the context of generally applicable policies, such as new employee onboarding and human resources policies, lobbying policies, employee benefits and compensation, and social media policies.

When drafting policies, it is important to focus on the company’s resources and the need to actually implement the policies you adopt. Such factors as the allocation of compliance resources, the number and duties of compliance personnel, and compliance culture can all have a role to play in mitigating political law risks.

9.3 Take Steps to Ensure Full Implementation of the Compliance Program

Measures to encourage full compliance with these policies by executives and other employees should be adopted, such as:

An Awareness Program That Includes Regular Trainings

A significant proportion of political law violations are caused by employees who did not know they were violating the law. As a result, a key way to mitigate political law risks is to ensure that employees are aware of their obligations. This can involve trainings, notifications, alerts, and similar initiatives.
Compliance programs are becoming more sophisticated, with new tools such as temporal notifications, intranet content, FAQs, case studies, and other learning tools. It can be particularly helpful to send election season notifications regarding employee political activity to ensure that employees are reminded of policies and procedures at a time when they might be receiving solicitations or themselves engaging in campaign fundraising.

As with other elements of a compliance program, awareness and training initiatives should be tailored to address a firm’s risk profile. As a result, those employees with greater responsibility or exposure should receive additional attention, and are likely to be the focus of training efforts. For example, separate trainings might be conducted for executives, government affairs professionals, the PAC Board, restricted class members, and PAC administrators.

**Conduct Regular Monitoring and Testing**

Monitoring and testing is a key component of a robust compliance program. Monitoring and testing can ensure that existing policies and procedures are functioning appropriately and also detect violations. Monitoring and testing of PAC activities might include checks to ensure that contribution forms are complete and properly maintained, solicitation texts are reviewed and include appropriate disclaimers, and reconciliation of bank accounts and FEC reports. Larger corporations may be able to leverage internal audit functions to assist in monitoring and testing PAC activities.

**Establish Compliance-Oriented Recordkeeping**

While the law imposes very specific recordkeeping obligations, a robust compliance program requires that records be created that document how the company has complied with applicable requirements. These can be helpful in the event of enforcement or a potential violation, to show the efforts undertaken to prevent a violation and to uncover the cause of a potential compliance breakdown. This will also improve the efficiency of the compliance department, particularly when personnel changes occur.

9.4 **Regularly Review the Adequacy of Your Compliance Program**

Companies regularly undergo dynamic change—ranging from major changes such as the acquisition or divestment of a business line to more modest changes such as the hiring of a new executive or a focus on a different regional market. Legal regimes and market practices can also undergo change, making prior approaches outdated. As a result, it is important to periodically review whether there have been any developments that merit changes to your firm’s compliance program. On occasion, retaining experienced political law counsel who did not establish your own program to conduct a compliance review can provide a useful second look to help your tailor your program to your current needs.
Module 10:
Response Strategy if You Discover a Potential FECA Violation

In the event that a potential violation is discovered—whether though an internal audit, monitoring, self-reporting, a whistleblower, external sources, or other means—a strategic, deliberate approach by the corporation can significantly reduce potential liability and associated expenses. In this module, we provide a strategy for your legal and compliance response. Each situation will vary, and our proposed approach can and should vary to reflect the specific context of a potential violation.

A Three-Step Response to the Detection of a Potential Violation:

- Conduct an internal review to determine the nature and extent of any violation
- Develop a remediation plan: Fix the issue itself and prevent it from recurring in the future
- Consider whether and how to engage with regulators

10.1 Conduct an Internal Review to Determine the Nature and Extent of Any Violation

The first step is generally an internal review to consider whether a statute, regulation, internal policy or best practice has been violated. This should include both a review of the relevant facts, as well as applicable legal principles and market practice. If there is a potential violation of the law, it is important to consider whether a possible exception or defense might apply, such as the “Best Efforts” defense.

Whether you launch a full-blown investigation or conducted a more targeted review of the circumstances, it is most important to act swiftly to ascertain the scope of the potential violation, including the timeframe, individuals involved, amount at issue, and other relevant facts.

Depending upon the extent of the potential liability, Compliance, Legal, Audit or a Risk Committee should consider whether to retain outside counsel to conduct an independent investigation or review of the matter or of the PAC compliance program more broadly. While involving outside parties may require additional resources, there is often a benefit to having an independent third-party involved, and outside counsel may also have special expertise, while also being able to invoke attorney-client privilege.
10.2 Develop a Remediation Plan

Armed with information about the potential violation and its scope, a plan to remediate the issue may be developed. There are two distinct elements to the creation of a remediation plan:

(a) **Address the potential violation** itself, and attempt to unwind the conduct that could be considered unlawful. The remediation plan should be tailored to the potential violation, and may involve refunding excessive contributions, amending FEC reports, or reassigning or disciplining employees.

(b) **Address the compliance breakdowns** that gave rise to the potential violation, which might involve requiring additional trainings, enhanced monitoring, and a review of effectiveness of the compliance program.

Each aspect of the remediation plan should take into account whether and to what extent to engage with regulators and to anticipate how the regulators might view the remediation plan. In certain circumstances—e.g., where funds have been embezzled from the PAC—the steps that are required will be quite clear. In other cases it will depend on your assessment of the specific context of the violation.

10.3 Consider Whether and How to Engage with Regulators

The third step is to develop a plan of action for engaging with regulators regarding the potential violation. Engaging with regulators always involves a degree of risk. Depending on the context, however, such engagement may be the best option. Engagement with the FEC may take a number of forms. When confronted with a potential violation, therefore, it is important to assess the pros and cons of each potential mode of engagement in light of the underlying facts.

In some cases, there will be clear advantages to regulator engagement. For example, if the violation appears to be a clear breach of law, it may be advisable to prepare a self-report of the violation to the FEC. As discussed in Module 8, the FEC has a policy for leniency when violations are self-reported—benefits can include the potential for a reduced penalty and credit for cooperation that might be considered in discussions with other regulators (such as the DOJ or state regulators). Self-reporting also allows the company to frame the issues for the FEC, rather than allowing another party (such as a former employee, watchdog, or political actor) to frame the issues. It may also be possible to request fast track resolution, which can reduce the time required to resolve the matter and related legal expenses.

Some issues may be resolved in a more tailored manner. For example, some reporting issues may be resolved by amending FEC reports without the need for a robust internal investigation. Significantly, before amendments are made, it is important to understand the potential impact of those amendments. For example, amendments might trigger an enforcement matter regarding whether reporting violations occurred or information was reported in an untimely manner. Depending upon the circumstances, it may be advisable to consult with your RAD analyst or counsel before filing amendments to ensure that proposed amendments are necessary and would cure any potential reporting concerns.
Conclusion

In sum, implementing programs around federal campaign finance laws and best practices is detailed, complicated, and time-consuming. For these reasons, it is important to have knowledgeable counsel with experience inside the agency regarding agency function. If you have a PAC, you should conduct a periodic review to determine compliance with federal law and regulations. Doing so in advance of significant electoral activity (such as Presidential election years) can be beneficial to avoid issues that could incur greater expense in an audit or enforcement matter down the road.
Washington, D.C.
Allen & Overy LLP
1101 New York Avenue, NW
Washington, D.C. 20005
Tel +1 202 683 3800
Fax +1 202 683 3999

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