

FEC STRICTLY ENFORCING BAN ON COMPANY FACILITATION OF POLITICAL CONTRIBUTIONS

The Federal Election Campaign Act prohibits corporations from using corporate funds to make political contributions to candidates for federal office. 2 U.S.C. § 441b(a). The Federal Election Commission (“FEC”) has interpreted this provision broadly to place substantial restrictions on the use of corporate resources to raise funds for federal candidates. FEC regulations have long provided a *de minimis* exception for the incidental use of corporate facilities when raising funds for federal candidates. In 1999, however, the FEC promulgated new and much stricter rules for corporate employees to follow when raising campaign funds in the workplace. A recent enforcement action in this area shows that the FEC Office of General Counsel is taking a very hard line in interpreting these new regulations. Companies that have not already done so should establish written policies regarding the use of corporate resources to raise funds for federal candidates.

VOLUNTARY POLITICAL ACTIVITY BY CORPORATE EMPLOYEES – *THE INCIDENTAL USE EXCEPTION*

The FEC’s long-standing rule governing the use of corporate facilities for fundraising is that corporate employees may use corporate facilities for their own volunteer political activities so long as the use is “occasional, isolated or incidental.” 11 C.F.R. § 114.9(a). If the use occurs during normal working hours, it will be considered to be occasional, isolated or incidental so long as the activity does not prevent the employee from completing his or her normal work load. 11 C.F.R. § 114.9(a)(1)(i). Any volunteer political activity that does not exceed one hour per week or four hours per month will be considered a *per se* occasional, isolated or incidental use of corporate facilities, regardless of whether it occurs during or after normal working hours. 11 C.F.R. § 114.9(a)(1)(iii). Corporate employees who make more than occasional, isolated or incidental use of corporate facilities for their own voluntary political activities are required to reimburse the corporation for the use of the corporate facilities within a commercially reasonable time. 11 C.F.R. § 114.9(a)(2).

FEC ENFORCEMENT OF THE INCIDENTAL USE EXCEPTION

The FEC, in a series of enforcement actions, has taken an increasingly restrictive view of the incidental use exception. The FEC’s position is that 11 C.F.R. § 114.9 does not apply to “collective enterprises” where a corporate executive directs subordinates to carry out political fundraising projects on behalf of a federal candidate using corporate resources. Accordingly, these “collective enterprises” amount to illegal corporate campaign contributions.

The FEC has brought a number of enforcement actions against prominent corporations based on this “collective enterprise” theory. All of these enforcement actions ended in conciliation agreements that required the corporations to pay civil penalties. *See, e.g., In the Matter of Prudential Securities, Inc.*, MUR 3540 (\$550,000 civil penalty for systematically using corporate resources to raise more than \$250,000 in contributions for 10 different candidates over a seven year period); *In the Matter of Cherry Communications, Inc.*, MUR 3672 (\$150,000 civil penalty for using corporate facilities to pressure employees to contribute \$113,125 to the National Republican Senatorial and Congressional Committees); *In the Matter of Chrysler Corporation*, MUR 3672 (\$11,000 civil penalty for allowing a corporate executive to use corporate facilities to solicit contributions from other Chrysler executives).

CORPORATE FACILITATION OF THE MAKING OF POLITICAL CONTRIBUTIONS

After obtaining a \$550,000 civil penalty in the *Prudential* matter, the FEC issued regulations to define with greater specificity the limits on a corporate employee’s ability to use corporate facilities while raising funds for federal candidates. *See generally* 11 C.F.R. § 114.2(f).

Basically, a corporate employee raising funds on behalf of a federal candidate may not:

- Order or direct subordinates or support staff to plan, organize or carry out a fundraising project as part of their work responsibilities, unless the corporation receives *advance payment* for the fair market value of these services;
- Use a corporate list of customers, clients, or vendors to solicit contributions or distribute invitations to the fundraiser, unless the corporation receives *advance payment* for the fair market value of the list;
- Use meeting rooms for fundraising events unless they are customarily made available to clubs, civic groups, or other community organizations for similar purposes;
- Order catering or other food services for a fundraiser, unless the firm receives *advance payment* for the fair market value of these services; or
- Provide materials, such as stamped, pre-addressed envelopes, for the purpose of transmitting or delivering contributions.

There is an inherent contradiction between the corporate facilitation regulations and the incidental use exception with regard to the timing of payments to a corporation for the use of corporate resources for political activities. The corporate facilitation regulations require advance payment for the fair market value of the corporate resources, while the incidental use exception allows corporate employees to reimburse the corporation within a commercially reasonable time. Compare 11 C.F.R. § 114.2(f) with 11 C.F.R. § 114.9(a)(2).

MUR 5337: IN THE MATTER OF FIRST CONSUMERS NATIONAL BANK

The FEC recently made public the first known enforcement action under 11 C.F.R. § 114.2(f). In Matter Under Review (MUR) 5337, the FEC found that First Consumers National Bank and its former president, Gregory Aube, had violated 11 C.F.R. § 114.2(f) by using corporate resources to facilitate the making of contributions to a trade association PAC. The facts in this MUR are particularly striking because they are typical of the type of political fundraising activity that is going on in companies all across the country.

In March 2000, First Consumers National Bank held a Managers' Dinner attended by sixty-eight officers and managers, including the then-president of the bank, Gregory Aube. During the course of the dinner, Mr. Aube orally requested those in attendance to make a \$50 contribution to a political action committee operated by the Oregon Bankers Association. Mr. Aube asked those willing to make a contribution to forward it to his secretary so that she could forward them in a group to the PAC. On April 10, 2000, Mr. Aube sent a follow-up memorandum, on bank letterhead, to all bank managers again soliciting \$50 contributions to the Oregon Bankers Association PAC and again directing the managers to forward their contributions to Mr. Aube's secretary. On May 16, 2000, Mr. Aube's secretary, at his direction, sent an e-mail to all bank managers asking those that had not already done so to forward their contributions to her by May 19, 2000. Mr. Aube's secretary eventually collected 44 separate contributions totaling \$1,570 and forwarded them to the Oregon Bankers Association PAC.

The FEC General Counsel concluded that using "Bank meetings, Bank stationary, the Bank's computer network server and the Bank's secretary to collect and forward contributions constitutes exactly the type of facilitating the making of a contribution prohibited by Section 114.2(f)(1)." MUR 5337, Conciliation Agreement at ¶13. First Consumers National Bank agreed to pay a civil penalty of \$16,500 – more than 10 times the amount raised for the Oregon Bankers Association PAC – in order to conclude the FEC enforcement action.

We believe that MUR 5337 is a clear indication that the FEC General Counsel's Office intends to very strictly enforce the requirements of 11 C.F.R. § 114.2(f). Companies that have not already done so should establish written policies regarding the use of corporate resources to raise funds for federal candidates.

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