

Advisory Opinions

Federal Election Commission

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Some of the information presented in this publication has been modified by Federal Register Notice 2009-11 regarding the Commission's New Advisory Opinion Procedures and Explanation of Existing Procedures, published on July 7, 2009. An updated version of this publication will be available at a later date. In the interim, Notice 2009-11 can be found on the FEC's website at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-11.pdf.

This brochure, which pertains only to activities related to Federal elections, answers questions about how individuals may seek guidance from the Federal Election Commission (the "Commission") by requesting advisory opinions. An advisory opinion is an official Commission response to a question relating to the application of the Federal campaign finance law to a specific, factual situation. Provisions of the Federal Election Campaign Act (the "Act") include contribution limits and prohibitions that apply to federal elections; disclosure and recordkeeping rules; foreign national prohibitions relating to federal and nonfederal elections; and the presidential public funding provisions.

Citations refer the Act, contained in 2 United States Code (2 U.S.C.) and to Commission regulations, contained in Title 11 of the Code of Federal Regulations (11 CFR). If you have any questions after reading this brochure, please call the Commission in Washington, D.C. at 202/694-1100 or, toll free, 800/424-9530.^{1*}

Can anyone request an advisory opinion?

An advisory opinion may be requested by any person affected by the Act, Commission regulations or chapters 95 or 96 of the Internal Revenue Code of 1954. The request may also be made by an authorized agent, as long as the agent discloses whom he or she is representing. 11 CFR 112.1(a)

Must an advisory opinion request (AOR) follow any special format?

The requester must submit the request in writing. The request must include a complete description of all facts relevant to the specific transaction or activity. 2 USC 437f(a)(1) and 11 CFR 112.1(b) and (c). The request must concern a specific transaction or activity that the requester plans to undertake or is currently undertaking and intends to continue in the future. 11 CFR 112.1(b).

¹ The reader should not rely solely on this brochure but should also consult the Federal Election Campaign Act and Commission regulations. See 2 U.S.C. 437f and 11 CFR Part 112.

When would a request not qualify as an AOR?

A request would not qualify as an AOR if it:

- Presents only a general question of interpretation;
- Poses a hypothetical situation;
- Concerns the activities of third parties who are not represented in the request;
- Addresses past action exclusively; or
- Contains insufficient information. 11 CFR 112.1(b) and (c).

Where should the request be sent?

Requests for advisory opinions should be addressed to the Federal Election Commission, Office of General Counsel, 999 E Street, N.W., Washington, D.C. 20463. 11 CFR 112.1(e).

When is the requester notified if his/her request does not qualify as an AOR?

The Office of General Counsel (OGC) notifies a requester within ten days of receiving his/her request if the request is incomplete (*i.e.*, lacks sufficient information) or otherwise does not qualify as an AOR. 11 CFR 112.1(d).

What happens to the request once it has been received by the Commission?

Each request that qualifies as an AOR under 11 CFR 112.1 is assigned an AOR number and is promptly made public at the Commission. The full text of the request is placed in the Commission's Public Records Office and on the Commission's web site at www.fec.gov. 11 CFR 112.1(f) and 112.2. The AOR is also listed in the Commission's monthly newsletter, the *Record*.

May the requestor withdraw an AOR?

Yes. The requestor may withdraw in writing an AOR at any time before the Commission takes any vote on the opinion.

Are copies of AORs made available to the public?

Yes. Copies of AORs (and supplements to AORs) may be reviewed and copied in the Commission's Public Records Office. 11 CFR 112.2(b). The Commission charges five cents per photocopied page. Copies may also be obtained by writing the Public Records Office. Orders should be accompanied by a check or money order made payable to the Federal Election Commission. Alternatively, AORs and their supplements may be viewed online at www.fec.gov.

May interested parties comment on AORs made public by the Commission?

Yes. Written comments on AORs must be addressed to the Commission's Office of General Counsel and must be submitted within ten days after the AOR is made public. (These comments are also made public.) The Act and Commission regulations require the

Commission to consider all written comments submitted within the 10-day comment period before issuing an advisory opinion. 2 USC 437f(d) and 11 CFR 112.3(e).

Must comments on AORs be submitted according to any special format?

Yes. Comments on AORs should refer to the AOR number and statutory references should be to the United States Code—not to the Public Law citations.

Does the Commission grant extensions for submitting comments on AORs?

Yes. The Commission may grant additional time for written comments on the AOR itself. 11 CFR 112.3(b).

Who actually issues the advisory opinion (AO)?

The staff of the Office of General Counsel drafts AOs, which are then presented to the six Commissioners for their consideration, usually in regularly scheduled open sessions. An AO is issued only when it has been approved by at least four Commissioners. 11 CFR 112.4. Sometimes, Commissioners may write concurring or dissenting opinions.

May the public comment on a draft AO before the draft is considered by the Commission in an open session?

Yes. A draft of each AO to be considered by the Commission is made public approximately one week before the open session at which it is to be considered. At that time, a copy of the draft is faxed or e-mailed to the requestor with instructions on how to comment. Also, the Public Records Office makes the draft available to the public in its office and on the Commission’s website with commenting instructions. Comments on the draft AO are usually due to the Secretary of the Commission with a full duplicate copy to OGC by noon (Eastern Time) on the day before the open meeting at which the draft is to be considered. The closing date for comments on the draft AO will be included in the comment instructions attached to a draft. Comments received after the deadline will be returned to the commenter and will not be accepted, considered or circulated. Timely comments will be circulated within the Commission and will be made public. The Commission and OGC will consider all timely made comments on a draft AO before the draft is voted on by the Commission. This comment procedure does not apply to 20-day expedited AOs (see below). See *58 Fed. Register* 62259 (Nov. 26, 1993).

Is there a statutory deadline for issuing an AO?

Yes. The Act directs the Commission to issue an AO within 60 days of receiving a complete AOR. 2 USC 437f(a)(1) If the deadline falls on a weekend or holiday, the deadline is moved to the next business day. 11 CFR 112.4(c). If the Commission cannot agree on an AO, the requester must be so notified within the 60-day period. 11 CFR 112.4(a). Note: The 60-day period begins on the date the Commission receives sufficient information to make the AOR complete.

Is the deadline for issuing an AO shortened when the request concerns an upcoming election?

Yes. The Act directs the Commission to issue an AO within 20 days of receipt of a complete AOR from a Federal candidate, or his/her authorized committee, when the AOR is submitted within 60 days before a Federal election. However, the AOR must present a specific transaction or activity related to the election, and that relationship must be explained or be apparent in the request. 2 USC 437f(a)(2) and 11 CFR 112.4(b)(1) and (2). Note: The 20-day period begins on the date the Commission receives sufficient information to make the AOR complete.

Once issued, are AOs made available to the public?

Yes. Searchable versions of AOs (along with any concurring or dissenting opinions filed by the Commissioners) are available on the Commission's web site and through the Commission's 24-Hour Automated Faxline at (202) 501-3413. Copies are available for review and purchase at the Commission's Public Records Office, 999 E Street, N.W., Washington, D.C. 20463. 11 CFR 112.4(g). The Commission charges five cents per photocopied page. Copies of AOs may also be ordered by writing the Public Records Office or by phone (202/694-1120 or, toll free, 800/424-9530). Additionally, the Commission's monthly newsletter, the Record, summarizes all AOs and, to facilitate purchases, indicates the length of the AO. To subscribe to the Record, call the Information Division at 202/694-1100 or, toll free, 800/424-9530, or download issues from the Commission's web site at www.fec.gov.

Who may rely on the guidance provided by an AO?

The AO provides legal protection to the requester and to any person involved in a specific activity "indistinguishable in all its material aspects" from the activity described in the AO, so long as such a requestor or person acts in good faith in accordance with the AO. 2 USC 437f(c)(2) and 11 CFR 112.5(a)(1) and (2) and 112.5(b).

What happens to AO drafts that are not approved by the Commission?

When the Commission is unable to agree on what response to give to an AOR, the General Counsel sends a letter to the requester with a copy of any drafts considered by the Commission. The letter states that the Commission was unable to approve the AO by the required four-vote majority. 11 CFR 112.4(a). This letter is then made public in the Commission's Public Records Office and on the Commission's web site at www.fec.gov.

May the Commission reconsider an AO it has approved and issued?

Yes. Reconsideration is a two-step process:

A) Request and motion for reconsideration:

- 1) The person who originally asked for the AO may request reconsideration, provided the request is in writing and is submitted within 30 days after receiving the opinion. The request will be considered only if a Commissioner who voted in the majority that originally approved the AO makes a motion to reconsider it; or

- 2) Even absent a request from the person who originally asked for the AO, a Commissioner who voted in the majority that originally approved the AO may move for reconsideration within 30 days after the opinion was approved.

If the Commission approves such a motion by a vote of at least four Commissioners, the original opinion is vacated.

- B) The Commission will then reconsider the substance of the original AOR. Once it completes reconsideration of the substance of the AOR, the Commission may then re-approve the original (now vacated) AO or may approve a different draft of the AO. 11 CFR 112.6.