IN COMPLIANCE

HOLTZMAN VOGEL'S MONTHLY ROUND-UP

A Lookback at the Federal Election Commission in 2024

by: Matt Petersen

Now that the presidential election has concluded and 2024 is drawing to a close, it is worth looking back at one of the most consequential years for the Federal Election Commission (FEC) in recent memory. From expanding opportunities for federal candidates to both collaborate with grassroots groups on getting out the vote and raise unlimited money for state ballot measures to clarifying the ways in which candidates and parties can engage in joint fundraising activities to issuing guidance on the use of AI-generated content in campaign ads, the FEC had a remarkably active year that will have an enduring impact on the country's electoral system.

Below is a summary of the FEC's most significant decisions in 2024.

Candidate interactions with canvassing groups. In a decision that significantly influenced the interactions between campaigns and outside groups during the 2024 election, the FEC concluded in **Advisory Opinion 2024-01 (Texas Majority PAC)** that federal candidates may consult and share non-public strategies and plans with groups engaged in door-to-door canvassing without these activities being considered "coordinated" under FEC regulations. This means that expenses related to such canvassing programs are not counted as in-kind contributions to the candidates being consulted.

The FEC reached this decision after determining that door-to-door canvassing programs are not "public communications" because they do not involve the dissemination of content through an intermediary like a TV or radio station, a newspaper, or a third-party website. As non-public communications, canvassing programs fall outside the definition of "coordinated communication," even when they are financed with money raised outside federal contribution limits and involve extensive input from a federal campaign.

This decision created new opportunities for candidates to work directly with outside groups (like Super PACs and non-federal political committees) to conduct grassroots activities supporting those candidates, including express advocacy on the candidates' behalf. Groups that collaborate with candidates on canvassing efforts but that also plan to engage in paid advertising (such as TV ads, phone-banking, and direct mail)—all of which qualify as public communications—will need to establish appropriate firewalls to ensure that such ads do not trigger the FEC's coordination regulations.

Candidate fundraising for state ballot measures. In **Advisory Opinion 2024-05 (Nevadans for Reproductive Freedom)**, the FEC considered whether a federal candidate may raise money outside of federal limits and source prohibitions for groups that support or oppose state ballot measures. The advisory opinion was requested because federal candidates are subject to a prohibition against raising or spending funds "in connection with an election for Federal office … unless the funds are subject to the limitations, prohibitions, and reporting requirements of" the Federal Election Campaign Act (FECA). The Commission concluded that FECA's definition of "election" only covers individuals seeking elective office, and that ballot measure contests fall outside the scope of the term. For this reason, restrictions on a federal candidate's ability to raise and spend funds in connection with elections do not apply in the context of ballot measure contests.

Thus, following Advisory Opinion 2024-05, federal candidates may now raise unlimited funds from wealthy individuals, corporations, and labor unions on behalf of groups supporting or opposing state ballot measures if otherwise permitted by state law. This is true even if federal races and a ballot measure are voted on during the same election. Candidates will need to remain mindful, though, that they are still subject to applicable state laws. (Relatedly, the FEC recently submitted a **legislative recommendation** to Congress to amend FECA to prohibit foreign nationals from making contributions or expenditures in connection with state and local ballot initiatives and referenda.)

Joint fundraising committees. The FEC received multiple advisory opinion requests regarding the rules applicable to joint fundraising committees (JFCs) this past year. The first request was **brought by Holtzman Vogel on behalf of Team Graham**, the principal campaign committee of Senator Lindsey Graham, asking whether the JFC in which it participates may also include a Super PAC. The FEC **approved the request** on the condition that (1) any funds raised by the Super PAC comply with federal contribution limits and source prohibitions, and (2) the campaign may not engage in coordinated communications with the Super PAC. Importantly, the FEC determined that the candidate's campaign and other JFC participants (including the Super PAC) may collaborate on distributing public communications in the form of solicitations, invitations, and similar fundraising event announcements on behalf of the JFC, and that the communications will not constitute coordinated communications, so long as each JFC participant pays its proportionate share of the related expenses.

A month later, the FEC addressed a **second request** regarding JFCs, this one brought by the DSCC and two Democratic Senate candidates. Their question was whether a JFC consisting of a federal candidate and a political party could (1) pay for television ads that expressly advocate for the election or defeat of an identified candidate and contain a fundraising solicitation (with an on-screen QR code linking to an online donation webpage) at the end and then (2) split the costs among the JFC participants according to the allocation formula in the joint fundraising agreement. The requesters also asked whether the proposed ads would need to include the full joint fundraising notice, disclosing (among other things) all participants and the allocation formula.

Holtzman Vogel submitted comments on behalf of both **the NRCC** and **attorneys in the firm's campaign finance group** explaining that a JFC's payments for the proposed solicitation communications would be consistent with FEC regulations and precedents and with past joint fundraising practice. Nevertheless, the requesters indicated through their **written comments** and their responses at the FEC meeting at which the request was considered that their primary motivation was not to fund JFC ads themselves but to impose restrictions on third parties engaged in joint fundraising activities similar to those described in the requesters' proposal.

The FEC **split 3-3** on the request, with the three Republican Commissioners concluding that the requesters' proposal complied with the applicable joint fundraising regulations and that the proposed ads did not need to include a full joint fundraising notice so long as the QR code in the ads directs viewers to a webpage containing the full notice, while the three Democratic Commissioners took the opposite position. The Commission's deadlock will likely result in more JFCs between parties and candidates running similar solicitation ads since it is clear that there are not currently four votes on the FEC to find that such conduct amounts to a violation.

Note, though, that the DCCC has filed suit against the FEC, arguing that the agency's failure to issue an advisory opinion in response to the DSCC's request violated the Administrative Procedure Act and seeking a declaration that the joint fundraising activity at issue in the request constitutes a contribution from the political party to the participating candidates. The district court **denied the DCCC's motion for preliminary injunction** before the election. But the case is ongoing and worth monitoring.

Candidates establishing state PACs. In a decision that enhances the ability of federal candidates to assert influence in state and local elections, the FEC approved **Advisory Opinion 2023-09 (Cortez Masto)** concluding that a federal candidate may establish a state-level political committee that engages exclusively in non-federal activities, so long as the committee complies with federal contribution limits and source prohibitions. The FEC also determined that donations to the state-level committee will not be aggregated with contributions made by the same source to the candidate's federal leadership PAC. This is because amounts raised by the state committee are not "contributions" under FECA since they will not be used for the purpose of influencing federal elections. So, a single person may now annually give up to $5,000 to a federal candidate's leadership PAC and another $5,000 to that candidate's state committee.

Now that federal candidates can establish what are, in essence, state-level leadership PACs that have their own separate contribution limits, they have another vehicle available to them for raising and spending money, in this case to sway state and local elections as well as ballot measure contests. Candidates who decide to establish state committees will need to ensure they comply with all applicable state law requirements, including those governing registration and reporting.

Hybrid advertisements. "Hybrid advertisements" are campaign communications that contain both (1) a reference to a specific federal candidate and (2) a more generic reference to a political party and its candidates and whose costs are allocated between the candidate and the political party on a time-space basis. Hybrid ads have been commonplace in federal races for 20 years, but until this year, an FEC majority had never formally held that such ads are permissible. That changed in **Advisory Opinion 2024-14 (Rosen)**, where the Commission confirmed that the costs for ads that "equally promote" a particular candidate and a political party more generally may be split evenly between the candidate and the party.

In the opinion, the FEC clarified that portions of an ad that depict or feature narration from a federal candidate must be allocated to—and paid by—that candidate's campaign committee. The FEC split, however, on whether certain audio and visual elements (including references to a party's presidential candidate) qualify as generic references to a party's candidates. Holtzman Vogel **submitted comments** on behalf of the NRCC recounting the prominent role that hybrid ads have played in the political process for over two decades.

Candidate security. The FEC **promulgated a new rule** clarifying that a federal officeholder or candidate may use campaign funds to pay for various security measures to address ongoing threats. The use of campaign funds for such measures is not considered prohibited "personal use" of campaign funds so long as the threats would not exist if the individual were not an officeholder or a candidate.

Permissible security measures—which may also be provided to an officeholder or candidate's family members and employees—include:

- Non-structural security devices, such as locks, alarm systems, motion detectors, and security cameras;
- Structural security devices, such as wiring, lighting, doors, and fences, provided these are solely for security and not for property-improvement purposes;
- Professional security personnel; and
- Cybersecurity protections.

The FEC has previously authorized the use of campaign funds for officeholder/candidate security through a long-running series of advisory opinions. The new rule codifies those earlier advisory opinions and expands upon them in certain instances to address additional issues.

AI in campaign ads. The FEC **declined to act on a rulemaking petition** asking the FEC to broadly prohibit campaign ads that use deceptive images, video, and audio of candidates that are generated by artificial intelligence (AI). The primary reason for not opening a rulemaking on AI was that the FEC lacked the statutory authority to do so. FECA regulates "fraudulent misrepresentation" only in circumstances where (1) a candidate purports to speak, write, or act on behalf of another candidate or political party in a damaging manner, or (2) any person falsely represents that he or she is speaking, writing, or acting on behalf of a candidate or political party for purposes of soliciting contributions. The more comprehensive rulemaking on AI-generated campaign content sought by the petitioners would have gone far beyond those narrow statutory limits.

Instead, the FEC issued an **interpretive rule** clarifying that FECA's "fraudulent misrepresentation" provision is "technology neutral," and that "[t]his fraud may be accomplished using AI-assisted media, forged signatures, physically altered documents or media, false statements, or any other means." The FEC's decisions demonstrate that any additional regulation of AI usage in political communications will first require congressional action.

Reporting independent expenditures by non-political committees. In the enforcement context, the FEC clarified the donor disclosure that is required to be reported by non-political committees that disseminate communications that expressly advocate the election or defeat of a federal candidate. **Five Commissioners concluded** that independent expenditure reports filed by groups that are not federal political committees only need to disclose contributions that are received during the same quarter in which the independent expenditure was made. Contributions received during previous quarters do not need to be included on such reports.

The donor disclosure requirement discussed above only applies to "contributions"—donations earmarked for political purposes or funds intended to influence elections. **The three Republican Commissioners interpret "contributions"** to mean funds "designated or solicited for, or restricted to, activities or communications that expressly advocate the election or defeat of a clearly identified candidate for federal office."

Definition of "express advocacy." A Commission majority also provided additional guidance on the definition of "express advocacy" this year. Understanding the parameters of this definition is crucial because engaging in express advocacy may activate requirements to register as a political committee or report independent expenditures.

The FEC addressed the express advocacy issue in an enforcement matter involving Super PAC ads that sharply criticized a federal candidate. The ads at issue referred to the candidate as "shady," claimed he got rich off government loans he never paid back, said his campaign was spending millions to buy a Senate seat, and called him "[j]ust another millionaire politician who says one thing and does another." **A four-vote Commission majority concluded the ad was *not* express advocacy** under either the "magic words" test or the broader test that requires that "reasonable minds" cannot differ about an ad's message. The majority's rationale rested primarily on the fact that the ad was run nine months before the election, concluding that "it is axiomatic that the further an ad is run from a given election, the more likely that reasonable minds could differ about whether the ad constitutes an exhortation to vote for or against a specific candidate."

The group that filed the complaint in this matter is challenging the legality of the FEC's dismissal in D.C. federal district court. So, this is another case to watch closely.

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To paraphrase George Orwell, all years are equal, but some are more equal than others. That is certainly true of this past year for the FEC. The reverberations from the agency's decisions in 2024 will be felt well into the future and create new opportunities for candidates, political parties, and advocacy organizations alike.

Vance, NRSC, and NRCC Seek Supreme Court Review of Party Coordinated Expenditure Limits

Also in FEC news, J.D. Vance, the NRSC, and the NRCC filed a **petition for a writ of certiorari** with the Supreme Court on December 4 seeking review of their challenge to the limits on coordinated spending by political parties and candidates. The Supreme Court last upheld the party coordinated expenditure limits in 2001. Since then, both the composition of the Supreme Court and its campaign finance jurisprudence have changed significantly.

Earlier this year, the Sixth Circuit Court of Appeals upheld the party coordinated expenditure limits and concluded that the outcome of this challenge was controlled by the U.S. Supreme Court's 2001 decision in ***FEC v. Colorado Republican Federal Campaign Committee*** (known as "Colorado II"), which to date has not been overturned or revisited. Although the Sixth Circuit agreed that Colorado II controlled, there was substantial disagreement among the judges regarding the underlying constitutional questions. At least six of the 16 judges on the Sixth Circuit expressed serious concerns with the constitutionality of the limits, and one judge (Judge Readler) issued a dissent arguing that the court should strike down the limits. In a concurring opinion joined by three of his colleagues, Judge Thapar wrote that the Colorado II decision "allows us to dodge the grave constitutional issues posed by coordinated-party-spending limits" which "run afoul of modern campaign-finance doctrine and burden parties' and candidates' core political rights."

Federal District Court Blocks Enforcement of Corporate Transparency Act's Beneficial Ownership Reporting Rule

On December 3, the U.S. District Court for the Eastern District of Texas issued a **nationwide injunction** that prohibits the government from enforcing the beneficial ownership reporting rule in the Corporate Transparency Act along with the January 1, 2025 compliance deadline. The case is *Texas Top Cop Shop, Inc. v. Garland*. The Department of Justice filed a notice of appeal on December 5, and, on December 13, filed an emergency motion with the 5th Circuit Court of Appeals to stay the district court's injunction while the case is appealed. The 5th Circuit will hear the motion to stay on an expedited basis that may allow it to rule before the end of the year.

Following the December 3 injunction, the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) **noted on its website** that "reporting companies are not currently required to file beneficial ownership information with FinCEN and are not subject to liability if they fail to do so while the [court] order remains in force. However, reporting companies may continue to voluntarily submit beneficial ownership information reports."

We detailed the beneficial ownership reporting requirements in **October**. The beneficial ownership reporting rules are currently the subject of challenges in several other cases around the country. Multiple decisions from the courts of appeals are expected in 2026, and it is possible the Supreme Court may ultimately resolve the issue.

Union and Its PAC Hit with Hefty Penalty for Unauthorized Deductions and Failure to Provide Required Notices

A recent **consent judgment** issued by the U.S. District Court for D.C. provided a powerful reminder to corporate and labor union PACs that they must (1) obtain affirmative consent from employees before deducting amounts from their paychecks through payroll deduction systems (i.e., no "reverse checkoffs"), and (2) include the required notices on all PAC solicitations.

(The required notices disclose (1) the PAC's political purpose; (2) the right to refuse to contribute without reprisal; and (3) that any suggested contribution amounts are mere suggestions, that one may give more or less than the suggested amount, and that the amount given, or refusing to give, will not benefit or disadvantage the person being solicited.)

The case before the court involved Plumbers and Pipefitters Local Union No. 9, which along with its PAC had previously entered into a conciliation agreement with the Federal Election Commission (FEC) and agreed to pay a $92,650 civil penalty to resolve violations of the affirmative consent and notice requirements described above.

The FEC brought a lawsuit to enforce the terms of the conciliation agreement when it received a complaint alleging that the union and its PAC were violating the agreement by continuing to deduct amounts not only from the paychecks of employees who had not given their consent but also from the paychecks of employees who had explicitly declined to participate in the payroll deduction program.

These violations of the conciliation agreement resulted in the court imposing a $240,000 civil penalty and permanently enjoining the union and its PAC from deducting amounts from employee paychecks without first receiving written authorization and providing the required notices.

The magnitude of the penalty in this case highlights the importance of corporate and union PACs carefully complying with the legal requirements that apply to payroll deduction systems and PAC solicitations. Please let us know if you have questions about how this decision might impact your organization and its PAC.

Around the States

New York State Board of Elections Publishes Automatic Voter Registration Regulations for Comment

On December 9, 2024, the Commissioners of the New York State Board of Elections voted unanimously to approve and send out for public comment **regulations to implement Automatic Voter Registration** in New York State. The comment period will last for 60 days from the publication of the proposed regulations.

Automatic Voter Registration (or AVR) was originally enacted into law in 2020. With AVR, individuals who are eligible to vote but not registered will have the ability to register to vote when completing forms or applying for services provided for by a number of government agencies.

Controversial Resolution Adopted by New York State Public Campaign Finance Board

On December 9, 2024, the New York State Public Campaign Finance Board met and approved on a 4-3 party line vote a regulation permitting candidates in the public campaign finance program to transfer funds to party committees. Under the resolution adopted by the PCFB, transfers from candidate committees to party committees will be considered a permissible campaign expenditure. The resolution, which was put forward by Democratic Commissioner and longtime election lawyer Henry Berger, was opposed by the three Republican Commissioners on the PCFB – Brian Kolb, Peter Kosinski, and Anthony Casale.

The PCFB's resolution was also strongly criticized by state Republican leaders including State Senator George Borrello, Chairman of the Senate Republican Campaign Committee, and State Assemblyman Steve Hawley, Chairman of the Republican Assembly Campaign Committee. Borrello and Hawley argued that the PCFB was retroactively giving a pass to 2024 Democratic state legislative candidates who transferred campaign money to party committees, even though it was understood that this was impermissible at the time their transfers took place.

Change to New York Lobbying Act Filing Procedures Remains in Effect During Court Challenge

On November 26, 2024, David Grandeau, an attorney and former state ethics official, and two lobbying firms filed a lawsuit against the New York State Commission on Ethics and Lobbying in Government (COELIG). At issue is a rule recently adopted by COELIG known as the "Responsible Party Amendment. "This rule narrows the definition of "responsible party" for the purposes of filing lobbying disclosures with COELIG, dramatically reducing the number of individuals who may file lobbying disclosures with COELIG. The rule change effectively prohibits lobbyists and their clients from retaining a third party to prepare and submit their lobbying reports.

The Petitioners argue that in adopting this rule, COELIG has exceeded its authority under the Lobbying Act. Additionally, the Petitioners argue that because of former Gov. Andrew Cuomo's successful challenge to the constitutionality of COELIG, COELIG did not have the power to adopt the Responsible Party Amendment. Former Gov. Cuomo's challenge to COELIG was successful at the trial level, and the trial court's decision was upheld unanimously by the Appellate Division, Third Department. The New York State Court of Appeals will hear oral arguments in that appeal next month.

While a Supreme Court Justice denied Grandeau and his co-Petitioners a temporary restraining order preventing the enforcement of the Responsible Party Amendment, the challenge to the rule will be heard in Albany County Supreme Court on February 3, 2025.

State Court Upholds Missouri Voter ID Requirement

Cole County Circuit Court Judge Jon Beetem has **upheld Missouri's voter ID law,** dismissing a lawsuit filed by the Missouri NAACP and other plaintiffs who argued that the law restricts voting rights. The law, known as HB 1878, was enacted in 2022 following a 2016 constitutional amendment and requires voters to present an approved photo ID at the polls. In his ruling, Judge Beetem found that the plaintiffs lacked organizational standing to bring their lawsuit. However, he also noted that even if the plaintiffs did have standing, HB 1878 did not violate the fundamental right to vote or the equal protection clause of the Missouri Constitution. Plaintiffs indicated they would appeal the decision.

Washington State Court of Appeals Upholds $35 Million Judgement Against Meta for Campaign Finance Disclosure Violations

On December 2, the Washington State Court of Appeals **upheld a $35 million judgment** against Meta Platforms for repeated violations of the state's campaign finance laws that require online platforms to maintain records pertaining to political advertising. Meta, the parent company of Facebook and Instagram, failed to maintain and disclose required records about political ad sponsors, costs, and targeting details. In late 2022, a Washington state court found Meta had violated the records law 822 times and imposed a statutory maximum fine of $10,000 per violation. However, the intentional nature of Meta's violation led to the court trebling penalties, including attorney's fees, to reach a total fine of $35 million. Meta argued that the law was unconstitutional, but the appellate court disagreed, ruling that the law is content-neutral and focuses on transparency rather than editorial control. The court also rejected Meta's claims that the penalties were excessive, noting the company made no significant effort to comply and had a history of similar violations.

North Carolina Legislators Override Governor's Veto to Move Control Over Election Boards to State Auditor

On December 11, North Carolina's Republican-controlled legislature overrode Democratic Governor Roy Cooper's veto to enact a law that shifts control over state and local election boards from the governor to the state auditor. The legislation alters the appointment process for the state board of elections, transferring appointment power from the governor to the state auditor. Under the new law, the state auditor will now appoint the board's five members, although the requirement that no more than three members of the board be members of the same political party was retained. Additionally, the state auditor will select the chairs of local election boards across North Carolina's 100 counties, meaning that the auditor's party will effectively hold a one-vote majority on each county board. The new law also requires absentee ballots to be counted on Election Day.

HV Making the Rounds

- Holtzman Vogel launched an AI startup incubator program to empower innovators. *Law360*, *Law.com's LegalTech* and *Bloomberg Law* covered this news.
- Jill Vogel and Jason Torchinsky quoted in a *National Law Review* article on 2025 AI legal tech and regulations predictions. Oliver Roberts authored the article.
- Steve Roberts spoke at the annual ACI FARA conference.
- Joe Burns authored "Republicans Are Having a Moment in Deep-Blue New York State" for *National Review*.
- Mark Pinkert and Jason Torchinsky authored "How the Trump II Administration Can Combat Antisemitism" for the *Daily Business Review.*
- Steve Roberts was quoted in Bloomberg Government article, "Lobbyists Embrace Holiday Schmoozing on Eve of GOP Takeover."
- Andy Gould and Jonathan Fahey, both regulars on Fox News, appeared to discuss Trump's immigration plan and sanctuary cities. Jonathan also spoke on the Trump transition, DOGE and drones over New Jersey.
- Joe Burns was interviewed by the *South Shore Press* to get his take on the absentee ballot drop box process in New York.
- Holtzman Vogel sponsored the annual Blockchain Association Policy Summit.
- The Fifth Circuit invalidated an SEC ruling requiring NASDAQ listed companies to satisfy race and sex based quotas. Drew Ensign drafted amicus briefs to rehear the case en banc, and then to invalidate the challenged rule.
- Oliver Roberts has been speaking on the state of AI regulations and use of AI in the legal industry at various law schools and throughout the world.
- Joe Burns authored "Scrap the State's Taxpayer Funding of Elections" for the *New York Law Journal.*
- Our team placed wreaths in front of tombstones at Arlington National Cemetary, Tallahassee National Cemetary and National Memorial Cemetary of Arizona - "Remember the fallen. Honor those who serve. Teach the next generation the value of freedom."
- Our team has also adopted families for the holidays.

This update is for informational purposes only and should not be considered legal advice. Entities should confer with competent legal counsel concerning the specifics of their situation before taking any action.

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