



## **AO 2011-26 Funds Raised to Help Individuals Obtain Identification Not Subject to FECA**

An individual may raise and spend money for the purpose of assisting individuals in obtaining photographic identification in states where such identification is necessary for registering to vote and/or voting. Because the proposed activities will not be performed on behalf of any federal candidate or political party, and because the individual will not solicit or accept funds from any candidate or political party, the donations and disbursements will not be considered contributions or expenditures, and are therefore not subject to the requirements of the Federal Election Campaign Act (the Act).

### **Background**

Some states require individuals to present photo identification when registering to vote or voting. Mr. Martin H. Freeman, who requested the advisory opinion, intends to identify such individuals who do not possess photo identification and assist these individuals in obtaining the necessary identification. Mr. Freeman intends to seek donations that will be used solely to identify individuals needing photographic identification and to assist those individuals in obtaining the photo identification.

Mr. Freeman will neither solicit nor accept funds from any political party, candidate, political committee or agent thereof. He is not undertaking these efforts on behalf of any political party, candidate or political committee. Mr. Freeman will not assist voters in registering to vote or in the actual process of voting.

### **Analysis**

Persons who make expenditures are subject to a number of requirements and provisions in the Act and Commission regulations. An "expenditure" is defined as "any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office..." 2 U.S.C. §431(9)(A). Commission regulations expressly exempt the costs of encouraging individuals to register to vote or to vote from the definition of expenditure, as long as "no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote..." 11 CFR 100.133. Under this exemption, money Mr. Freeman spends in helping individuals to obtain photo identification will not amount to expenditures, as long as no effort is made to determine the party or candidate preference of potential voters.

The Act and Commission regulations define a contribution as “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.” 2 U.S.C. §431(8)(A). Mr. Freeman’s activities will not be performed on behalf of any federal candidate or political party, and Mr. Freeman will not accept any funds from, or solicited by, a candidate or political party. Therefore, provided Mr. Freeman does not make any effort to determine candidate or party preference in connection with his efforts, the proposed activities will not be for the purpose of influencing a federal election, meaning the money he raises will not constitute contributions. Therefore, the Commission concludes that Mr. Freeman’s proposed activities are not subject to the requirements or limitations of the Act and Commission regulations.

*(Posted 1/26/12; By: Isaac Baker)*

### **Resources:**

- [Advisory Opinion 2011-26](#) [PDF; 3 pages]
- [Commission Consideration of AOR 2011-26](#) 
- [Citizens' Guide Brochure](#)

## **AO 2011-25 Inactive Labor Union Members May Be Solicited by Corporation's SSF**

Atlas Worldwide, a holding company with a separate segregated fund (SSF), may solicit certain former pilots who serve in a management capacity with the company because they are part of Atlas Air's “executive or administrative personnel.” These individuals’ limited participation in a labor organization does not exclude them from the restricted class of the corporation’s SSF.

### **Background**

Atlas Worldwide is a holding company whose primary business involves worldwide cargo flights operated through two subsidiary companies: Atlas Air and Polar Air. Atlas Worldwide operates an SSF to which employees may contribute. Atlas Air and Polar Air employ a number of senior managers who support their flight operations, including Chief Pilots and Directors of Training and Flight Operations Administration.

These managers, former pilots, are “inactive” members of the Airline Professional Pilots Association Teamsters Union Local 1224, and remain so for the limited purpose of retaining seniority rights should they wish to resume being pilots. They pay no union dues, have no voting rights, are not represented in collective bargaining negotiations, are not covered by the collective bargaining agreement, and may not participate in strikes. They do receive union newsletters and may attend local or national union meetings, but are not subject to union disciplinary procedures and are not solicited for contributions to the union's SSF. They may also request union assistance with grievances against more senior managers.

Atlas Worldwide asks if the Chief Pilots and Directors of Training and Flight Operations Administration are “executive or administrative personnel” of Atlas Air and Polar Air and

therefore constitute members of Atlas Worldwide's restricted class. If so, given that they may not serve as full members of the labor organization, Atlas Worldwide asks if it may solicit them for contributions to its SSF.

## **Analysis**

Under the Federal Election Campaign Act (the Act) and Commission regulations, the Chief Pilots and Directors of Training and Flight Operations qualify as executive or administrative personnel. In determining which employees have "policymaking, managerial, professional, or supervisory responsibilities" (2 USC §441b(b)(7)), the Fair Labor Standards Act (FLSA) and regulations issued under the FLSA, may serve as a guideline. 11 CFR 114.1(c)(4).

Chief Pilots and Directors of Training and Flight Operations Administration are salaried employees whose primary duties are directly related to the management or general business operations of Atlas Air and Polar Air in that they exercise significant responsibility in assisting with the management and operation of the business. Chief Pilots' duties involve personnel management, human resources, legal and regulatory compliance and quality control. The Directors of Training and Flight Operations Administration have responsibilities including budgeting, quality control, personnel management, human resources, labor relations, government relations, internet and database administration and legal and regulatory compliance. Under FLSA, "administrative employees" are salaried, their primary duties are "directly related to the management or general business operations of the employer" and they "exercise discretion and independent judgment on matters of significance." 29 CFR 541.200 to 541.202. Based on these criteria, the Chief Pilots and the Directors of Training and Flight Operations Administration are part of the restricted class of Atlas Air and Polar Air, and may therefore be considered part of Atlas Worldwide's restricted class.

Commission regulations exclude from the restricted class any professionals who are represented by a labor organization. Assuming that pilots would be considered professionals under the FLSA, the managers are not professionals because they do not currently act as pilots, but rather perform only managerial and administrative tasks. Even if they were professionals, however, the managers' participation in the union is predominantly confined to receiving literature and attending meetings. They do not pay dues, they may not vote for or serve as union officers, and they may not benefit from union representation in collective bargaining negotiations. They are not covered by the collective bargaining agreement, and they may not strike. Their ability to request union assistance in grievances against more senior managers does not outweigh these serious limitations on their union membership rights. Thus, their inactive and limited membership in a labor organization does not remove them from Atlas Worldwide's restricted class, and they may be solicited for contributions to the Atlas Worldwide PAC.

*(Posted 1/24/12; By: Christopher Berg)*

## **Resources:**

- [Advisory Opinion 2011-25](#) [PDF; 8 pages]
- [Commission Open Meeting of January 19, 2012](#)
- [Campaign Guide for Corporations and Labor Organizations](#) [PDF; 134 pages]

## ***Wagner v. FEC***

Wendy Wagner, Lawrence Brown and Jan Miller (together, plaintiffs) filed suit against the Commission in the U.S. District Court for the District of Columbia challenging the section of the Federal Election Campaign Act (the Act) that prohibits federal government contractors from making contributions to candidates, party committees or political action committees in connection with federal elections. The plaintiffs' action challenges 2 U.S.C. §441c as violating the First Amendment and the Equal Protection guarantee of the Fifth Amendment.

### **Background**

The Act's ban on contributions by federal government contractors is codified at 2 U.S.C. §441c, which states that any person who has a contract with the United States or any agency or department thereof, including contracts for personal services, is prohibited from making any contribution "to any political party, committee, or candidate for public office or to any person for any political purpose or use." The Commission has previously construed this prohibition to apply only to federal elections.

The plaintiffs are individuals who state that they are eligible to vote in the 2012 elections. Each plaintiff alleges that he or she is currently under contract with the United States and would like to be able to make contributions in connection with federal elections. However, because of the federal contractor prohibition, the plaintiffs assert an unwillingness to make any such contributions absent a court order authorizing them to do so.

### **Constitutional Challenge**

Plaintiffs allege that 2 U.S.C. §441c violates the Equal Protection guarantee of the Fifth Amendment because the plaintiffs purportedly are not treated equally with individuals and corporations who are similarly situated with respect to their right to make contributions in connection with federal elections. The Commission's regulations state that contributions by officers, employees and/or stockholders of corporations with federal contracts may be made using personal funds. 11 CFR 115.6.

The plaintiffs also claim that Section 441c violates the First Amendment because it prohibits individuals with government contracts from making contributions to federal candidates and committees. Since the plaintiffs are prohibited from contributing to candidates who have no connection with the contracts that the plaintiffs have with federal agencies, the plaintiffs allege that the ban on federal government contractor contributions is not sufficiently narrowly tailored.

The plaintiffs ask the court to declare that 2 U.S.C. §441c as applied to the plaintiffs violates the First and Fifth Amendments to the Constitution, enjoin the Commission from enforcing Section 441c against the plaintiffs and award plaintiffs costs and attorneys fees for their action, together with any other relief to which they may be entitled.

*(Posted 1/27/12; By: Myles Martin)*

**Resources:**

- [Wagner v. FEC Ongoing Litigation Page](#)

***Bluman v. FEC***

On January 9, 2012, the Supreme Court summarily affirmed the judgment of the three-judge district court in the District of Columbia in *Bluman v. FEC*, which had granted the FEC's motion to dismiss and denied Plaintiffs' motion for summary judgment. The Plaintiffs, Benjamin Bluman and Asenath Steiman, both of whom are foreign nationals who lawfully live and work in the United States, had challenged the constitutionality of the prohibition on foreign nationals making contributions or expenditures in connection with U.S. elections.

Federal law and Commission regulations prohibit foreign nationals who have not gained permanent resident status in the United States from "directly or indirectly" making "a contribution or donation of money or any other thing of value...in connection with a federal, state or local election." Such persons are also prohibited from making "a contribution or donation to a committee of a political party," and from making a disbursement for independent expenditures or electioneering communications. 11 CFR 110.20.

The District Court had dismissed Plaintiffs' challenge to the constitutionality of the foreign national ban and Plaintiffs appealed that judgment to the Supreme Court. The Supreme Court summarily affirmed the judgment of the District Court.

*(Posted 1/18/12; By: Myles Martin)*

**Resources:**

- [Bluman v. FEC Ongoing Litigation Page](#)
- [Supreme Court Summary Affirmance \(January 9, 2012\)](#)
- [Foreign Nationals Brochure](#)

***Vogel for Congress v. FEC***

On December 30, 2011, Vogel for Congress and Mark Vogel (Plaintiffs) filed a complaint for judicial review against the Commission in the U.S. District Court for the District of Columbia. The Plaintiffs ask the court to review the Commission's decision to dismiss an administrative complaint filed with the Commission.

## **Background**

Vogel for Congress is the principal campaign committee for the candidacy of Mark Vogel, Libertarian candidate for the House of Representatives for the Second Congressional District of Indiana. On November 24, 2010, Vogel for Congress filed an administrative complaint with the Commission that alleged that immediately prior to the November 2010 Congressional election, the Indiana Democratic Party mailed up to 20,000 flyers to voters urging support for Libertarian candidate Mark Vogel. The flyers were not authorized by Mr. Vogel or by Vogel for Congress. The complaint also alleged that the flyers were required by the Federal Election Campaign Act (the Act) to carry a disclaimer stating that they were not authorized by the candidate or the candidate's committee. The complaint alleged that the mailer in question did not contain such a disclaimer.

On October 18, 2011, the Commission dismissed the administrative complaint after failing to find reason to believe that the mailer in question was required to include a disclaimer stating whether it was authorized by a candidate or by that candidate's campaign committee.

## **Complaint**

The plaintiffs ask the District Court to declare the Commission's dismissal of the administrative complaint contrary to law and order the Commission to conform with that declaration.

*(Posted 1/9/12; By: Myles Martin)*

## **Resources:**

- [Vogel for Congress v. FEC Ongoing Litigation Page](#)
- [Filing a Complaint Brochure](#)