

## CHAPTER 20

### FAIR CAMPAIGN PRACTICES ACT

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#### **20.1 Fair Campaign Practices Act Generally**

The Fair Campaign Practices Act (FCPA), Ala. Code § 17-5-1 et seq., was enacted in 1988 and replaced the Corrupt Practices Act. The FCPA governs how and when candidates and PACs for state and local elections can raise and spend money in connection with elections, how campaign finance activities are reported, how compliance with these requirements is regulated, and other campaign activities. The Secretary of State's Office has traditionally published a number of guides and other informational resources that are useful for understanding the requirements of the FCPA. Following the 2015 revisions to the FCPA, the Secretary of State's Office works with the Ethics Commission in preparing such materials.

## **20.2 Candidate Registration**

### **20.2.1 Threshold**

The FCPA requires every state or local candidate to establish a Principal Campaign Committee (PCC) once that candidate receives contributions or makes expenditures in excess of \$1,000. § 17-5-2(a)(1)(b).

### **20.2.2 Becoming a Candidate and Appointing a Campaign Committee**

The FCPA requires every state or local candidate to establish a Principal Campaign Committee (PCC) and file an “Appointment of a Principal Campaign Committee” form, which lists who serves on the committee, within certain time limits. § 17-5-4. The committee form must be filed within five (5) days of becoming a candidate. The FCPA defines two ways for a person to become a candidate and be subject to this requirement:

1. Qualifying as a candidate with a political party or by filing a petition as a third party or independent candidate. § 17-5-2(a)(1)(a).
2. Reaching the disclosure threshold by either raising or spending \$1,000, regardless of office sought. § 17-5-2(a)(1)(b).

A candidate’s PCC may consist of between two and five persons. As an alternative, a candidate may also serve as their own committee, and in that case, need not appoint any other person to their committee. A person serving as the sole member of their committee must also name a “Committee Dissolution Designee”.

### **20.2.3 Where to Register**

All state offices (which include circuit and district offices, legislative offices, state school board, and statewide candidates) and county offices must register with the Secretary of State’s office. In most cases, candidates seeking these offices will register online at [www.fcpa.alabamavotes.gov](http://www.fcpa.alabamavotes.gov). Municipal candidates file with the judge of probate for their county.

## **20.3 Political Action Committees (PACs)**

### **20.3.1 PAC Definition**

The FCPA defines a Political Action Committee (or PAC) as “[a]ny committee, club, association, political party, or other group of one or more persons, whether in-state or out-of-state, which receives or anticipates receiving contributions and makes or anticipates making expenditures to or on behalf of any Alabama state or local elected official, proposition, candidate, principal campaign committee or other political action committee. For the purposes of this chapter, a person who makes a political contribution shall not be considered a political action committee by virtue of making such contribution.” § 17-5-2(a)(13).

Any analysis of whether an entity satisfies the FCPA definition of PAC has to take into account the “major purpose” test. That test has been outlined and discussed by the U.S. Supreme Court and other courts in a long line of cases beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976). It generally evaluates whether an entity has a major purpose of engaging in election activity if they are to be deemed a PAC. *See, e.g., Richey v. Tyson*, 120 F.Supp.2d 1298 (S.D. Ala. 2000)

### **20.3.2 Political Parties**

The FCPA uses the definition of “political parties” as found in § 17-13-40:

“An assemblage or organization of electors which, at the general election for state and county officers then next preceding the primary, casts more than 20 percent of the entire vote cast in any county is hereby declared to be a political party within the meaning of this chapter within such county; and an assemblage or organization of electors which, at the general election for state officers then next preceding the primary, casts more than 20 percent of the entire vote cast in the state is hereby declared to be a political party within the meaning of this chapter for such state.” § 17-13-40.

### **20.3.3 Corporate / Association PACs (separate segregated funds)**

The FCPA permits a business or nonprofit corporation to establish a separate segregated fund (or SSF) and to expend corporate funds for the purpose of establishing, administering, or soliciting voluntary contributions to the SSF. § 17-5-14.1. The administrative expenses paid

by the business or nonprofit corporation that are connected to the SSF are not considered to be a “contribution” or “expenditure”. An SSF can be utilized “to aid or promote the nomination or election of any person ... who is or becomes a candidate for political office,” and “to aid or promote the interest or success, or defeat of any political party or political proposition.” A business may solicit voluntary contributions to the SSF only from the employees of a business (or its affiliates), stockholders, and the family members of both groups, and a nonprofit corporation may solicit only its members and their employees. However, an SSF may accept voluntary contributions from any individuals.

## **20.4 Contributions and Expenditures**

### **20.4.1 Definition of Contribution**

The term “**contribution**” is defined to include the following:

- (a) “A gift, subscription, loan, advance, deposit of money or anything of value, a payment, a forgiveness of a loan, or payment of a third party, made for the purpose of influencing the result of an election.
- (b) “A contract or agreement to make a gift, subscription, loan, advance, or deposit of money or anything of value for the purpose of influencing the result of an election.
- (c) “Any transfer of anything of value received by a political committee from another political committee, political party, or other source.
- (d) “The payment of compensation by any person for the personal services or expenses of any other person if the services are rendered or expenses incurred on behalf of a candidate, political committee, or political party without payment of full and adequate compensation by the candidate, political committee, or political party. Provided, however, that the payment of compensation by a corporation for the purpose of establishing, administering, or soliciting voluntary contributions to a separate, segregated fund as permitted in this chapter, shall not constitute a contribution.” § 17-5-2(a)(3)(a).

The term “**contribution**” does **not** include any of the following:

- (a) “The value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee.
- (b) “The use of real or personal property and the cost of invitations, food, or beverages, voluntarily provided by an individual to a candidate or political committee in rendering voluntary personal services on the individual’s residential or business premises for election-related activities.
- (c) “The sale of any food or beverage by a vendor for use in an election campaign at a charge to a candidate or political committee less than the normal comparable charge, if the charge to the political committee for use in an election campaign is at least equal to the cost of the food or beverage to the vendor.
- (d) “Any unreimbursed payment for travel expenses made by an individual who, on his or her own behalf, volunteers personal services to a candidate or political committee.
- (e) “The payment by a state or local committee of a political party of the cost of preparation, display, or mailing or other distribution incurred by the committee with respect to a printed slate card or sample ballot, or other printed listing of two or more candidates for any public office for which an election is held in the state, except that this subparagraph shall not apply in the case of costs incurred by the committee with respect to a display of the listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising.
- (f) “The value or cost of polling data and voter preference data and information if provided to a candidate or political committee, unless the information was compiled with the advance knowledge of and approval of the candidate or the political committee.”  
§ 17-5-2(a)(3)(b).

#### **20.4.2 Definition of Expenditure**

The term “**expenditure**” is defined to include the following:

- (a) “A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made for the purpose of influencing the result of an election.

- (b) “A contract or agreement to make any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, for the purpose of influencing the result of an election.
- (c) “The transfer, gift, or contribution of funds of a political committee to another political committee.
- (d) “The payment of any qualifying fee or other cost associated with qualifying to run for office.” § 17-5-2(a)(7)(a).

The term “**expenditure**” does **not** include any of the following:

- (a) “Any news story, commentary, or editorial prepared by and distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless the facilities are owned or controlled by any political party or political committee.
- (b) “Nonpartisan activity designed to encourage individuals to register to vote.
- (c) “Any communication by any membership organization to its members or by a corporation to its stockholders and employees if the membership organization or corporation is not organized primarily for the purpose of influencing the result of an election.
- (d) “The use of real or personal property and the cost of invitations, food, or beverages, voluntarily provided by an individual in rendering voluntary personal services on the individual’s residential or business premises for election-related activities.
- (e) “Any unreimbursed payment for travel expenses made by an individual who, on his or her own behalf, volunteers personal services to a candidate or political committee.
- (f) “Any communication by any person, which is not made for the purposes of influencing the result of an election.
- (g) “The payment by a state or local committee or a political party of the cost of preparation, display, or mailing or other distribution incurred by the committee with respect to a printed slate card or sample ballot, or other printed listing of two or more candidates for any public office for which an election is held in the state, except that this subparagraph shall not apply in the case of costs incurred by the committee with respect to a display of the listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising.” § 17-5-2(a)(7)(b).

### **20.4.3 Date of Contribution and Expenditure**

The date that a contribution is made is the first date that the recipient is able to use the contribution. For purposes of reporting obligations imposed by the FCPA, the date for contributions made by check is the earlier of:

- (a) 10 days from the date that the check came within the recipient's control; or
- (b) The date that the check was deposited into the recipient's account. § 17-5-2(a)(3)(c).

The date that an expenditure is made is the date that the instrument authorizes the expenditure. In the case of an expenditure made by check or electronic payment, it is the date of the check or electronic payment. § 17-5-2(a)(7)(c).

### **20.4.4 Corporate Contributions**

It is legal and permissible for any corporation incorporated under or doing business in Alabama to contribute to a PCC or PAC in the same manner and to the same extent as an individual. § 17-5-14. However, a utility regulated by the public service commission cannot contribute to a candidate for the public service commission. § 17-5-14(c).

## **20.5 Return or Refund of Contribution**

The FCPA allows for the return or refund of any campaign contribution. The law distinguishes a contribution refund (which the recipient reports) and a contribution return (which the recipient does not report). A contribution "refund" is permitted so long as the original contribution was reported in an itemized manner and the refund is also itemized in a report. § 17-5-7.1(a). In the case of a PAC, the refund must occur within 18 months of the date of the contribution, unless otherwise required by law or regulation. § 17-5-7.1(a). With respect to "returning" a contribution, if the contribution is not deposited in the PCC's or PAC's bank account, it may be returned without any reporting requirement by the recipient.

Unlawful contributions must be returned or refunded. It is a defense to prosecution that the unlawful contribution was returned or refunded in full within 10 days of the date that the contribution was made. § 17-5-7.1(b).

## 20.6 Use of Campaign Funds

### 20.6.1 Use of Principal Campaign Committee (PCC) Funds

A PCC is permitted to use campaign funds for the following purposes:

- (a) Expenditures of the campaign;
- (b) Expenditures that are reasonably related to performing the duties of the office held [does not include personal and legislative living expenses];
- (c) Donations to the State General Fund, the Education Trust Fund or equivalent county or municipal funds;
- (d) Donations to an organization to which a federal income tax deduction is permitted under subparagraph (A) of paragraph (1) of subsection (b) of Section 170 of the Internal Revenue Code of 1986, as amended, or any other charitable, educational, or eleemosynary cause of Section 501 of Title 26 of the U.S. Code;
- (e) Inaugural or transitional expenses;
- (f) Donations to a legislative caucus organization registered with the Clerk of the House, Secretary of the Senate, or both in the case of a bicameral caucus which does not operate as a political action committee [See § 17-5-5.1]; and,
- (g) Legal fees and costs associated with any civil action, criminal prosecution, or investigation related to conduct reasonably related to performing the duties of the office held. § 17-5-7(a).

A number of recent Ethics Commission advisory opinions and interpretations of these provisions are relevant to the application of these restrictions. *See e.g.* Ethics AO 2016-23. Summary information on recent Commission opinions on FCPA matters is included in Chapter 19 on the Ethics Commission. Due to the complexity of these requirements and the fact that this area of law may be evolving, candidates, PCCs, and PACs that have any questions or uncertainty about a particular issue or course of action should consult their legal advisor (and possibly the Ethics Commission).

A PCC may not make a contribution, expenditure, or any other transfer of funds to any other PAC or PCC. § 17-5-15(b). Under this restriction, a

PCC cannot contribute to a political party because, under Alabama law, a political party is a PAC, subject to a limited exception described below. As a result, candidates are limited in their ability to use PCC funds to contribute or make an expenditure (or any type of transfer) to a political party. Two exceptions to this general prohibition apply:

- (a) A PCC may transfer funds to another PCC for the same candidate (e.g., state legislator running for governor). § 17-5-15(b)
- (b) A PCC may make an expenditure to a political party for qualifying fees and may spend up to \$5,000 of campaign contributions during the two-year period between general elections for (a) tickets to political party dinners and functions, and (b) state and local political party dues. § 17-5-7(d).

### **20.6.2 Timing Restrictions**

A candidate, public official, or PCC may accept, solicit or receive contributions for a period of 12 months before an election in which the person intends to be a candidate. § 17-5-7(b)(2). However, candidates for statewide and legislative office cannot solicit or accept contributions when the legislature is in session except within 120 days of any primary, primary run-off, or general election. § 17-5-7(b)(2). This prohibition on fundraising when the legislature is in session does not apply to candidates of any special election called by the governor.

The restrictions on candidates accepting contributions more than 12 months before an election or when the legislature is in session does not apply to any loan from a candidate to their own PCC. § 17-5-7(b)(2).

The candidate may also solicit contributions for a period of 120 days after an election, but only to the extent of the campaign's debt as indicated on the financial disclosure forms or to the threshold for qualification as a candidate for the office that they currently hold. § 17-5-7(b)(3). AG AOs. 2001-056, 1999-0115, and 1999-0061.

### **20.6.3 Federal Candidate Contributions**

It is a felony for the PCC of a state or local candidate to receive campaign funds in excess of one thousand dollars (\$1,000) from the PCC of a federal candidate. § 17-5-15.1(a).

### **20.6.4 Disposal of Campaign Property**

Under the 2015 revisions to the FCPA, property that is purchased by or contributed to a PCC with a value of \$500 or more must be liquidated at fair market value or donated to an entity described in § 17-5-7(a) (e.g., state general fund, 501(c)(3) organization) not more than 120 days following the election. Any funds generated by the liquidation of this property must be deposited in the PCC. § 17-5-7.2(a). The Commission has established an exception by regulation which presumes that leftover campaign materials (e.g., signs, stickers, literature) have a nominal value below the \$500 threshold such that it does not need to be liquidated or donated. Ala. Admin. Code 340-X-1-.06.

The statute itself includes another exception to this liquidation/donation requirement. It provides that if a candidate wins the election, then any such surplus PCC property that can be used by the candidate in the performance of their official duties does not need to be liquidated or donated so long as the individual holds that office. § 17-5-7.2(b).

### **20.6.5 Use of PAC Funds**

PACs are not subject to the same restrictions that apply to a candidate's PCC. The FCPA contemplates that PACs may disburse funds on activities that are not related to political contributions or expenditures. This language also addresses reporting issues for PAC-related administrative expenses. § 17-5-3(d).

### **20.6.6 PAC-to-PAC Ban**

It is unlawful for any PAC or 527 political organization (including a PCC) to make "a contribution, expenditure, or any other transfer of funds" to any other PAC or 527 organization. § 17-5-15(b).

A PAC that is not a PCC is permitted to make contributions, expenditures, or other transfers of funds to a PCC. § 17-5-15(b).

An SSF established by a corporation under federal law is not restricted by this subsection in the amount it may transfer to a State SSF established PAC established under the provisions of law by the same or an affiliated corporation if the fund does not receive any contributions from within this state other than contributions from its employees and directors. § 17-5-15(b). A federal SSF is permitted to accept contributions from a

corporation's employees, stock holders, and their family members. However, if a federal SSF has accepted any contributions from the employees' or stock holders' family members that would preclude the federal SSF from contributing to the state SSF.

## **20.7 FCPA Disclosure Reports**

Candidates for state or local offices and their PCCs appointed under the FCPA must file periodic financial statements. They must file more frequent reports before primary and general elections detailing pertinent facts about their campaign finances. §§ 17-5-4, 17-5-8, and 17-5-9.

### **20.7.1 Reports of Contributions and Expenditures**

All candidates participating in an election are required to file pre-election campaign finance reports once a candidate meets the \$1,000 filing threshold, even if the candidate has no opposition in the pending election. § 17-5-8. Each pre-election report includes six forms covering contributions and expenditures. Those six forms are: Form 1 (Summary of Contributions and Expenditures), Form 2 (Cash Contributions), Form 3 (In-kind Contributions), Form 4 (Receipts from Other Sources), Form 5 (Expenditures), and Form 6 (Expenditures On Line of Credit).

### **20.7.2 Monthly Reports**

A PAC or PCC that receives contributions or makes expenditures with a view toward influencing an election result must file reports of those contributions or expenditures monthly beginning 12 months prior to the date of any primary, special, runoff, or general election. Monthly reports are due on the second business day after the close of the month.

### **20.7.3 Weekly Reports**

Beginning four weeks before an election, weekly reports are due on Monday of the succeeding week for each of the four weeks before the election. § 17-5-8(a)(2). If a candidate is not on the primary ballot because they are uncontested in the primary election, then they only submit their monthly report. This does not apply to uncontested general elections.

#### **20.7.4 Daily Reports**

Daily reports apply only to candidates for state legislature, state school board, and statewide offices. Daily reports do not apply to candidates for county and city offices or to candidates for district or circuit court, circuit clerk, or district attorney. § 17-5-8(a)(3).

Beginning on the 8<sup>th</sup> day prior to the election, daily reports are due for principal campaign committees or PACs that receive or spend \$5,000 or more on that day with a view toward influencing the election. § 17-5-8(a)(3). Daily reports would be due only on those days that the \$5,000 daily threshold is met.

Daily reports are due each filing day by 11:59 p.m., including Saturday and Sunday. The last daily report, if applicable, is due by noon on the day before the election. § 17-5-8(a)(3).

#### **20.7.5 Major Contribution Reports**

Unless included in another report, any single contribution of \$20,000 or more shall be reported by a PCC or political action committee within two business days of the receipt of such a contribution. This has been interpreted to include in-kind contributions, loans, and permissible committee transfers. § 17-5-8.1(c).

#### **20.7.6 Annual Report**

Every PCC, PAC, and elected state or local official who has not closed his or her PCC, shall file an annual report with the secretary of state by January 31 of the succeeding year. § 17-5-8(b). A committee required to file a monthly report is not required to file an annual report in the year in which the election is held. § 17-5-8(k). Such a committee would already be filing monthly reports.

#### **20.7.7 Judicial Reports**

Judges have additional requirements and should consult Canons 6C and 7 of the Canons of Judicial Ethics relating to filing requirements and campaign conduct in general.

The requirement previously set forth in § 12-24-2(a) to file a statement of disclosure two weeks prior to the commencement of the term of office for any judge or justice was repealed during the 2014 legislative session.

Section 12-24-3 now addresses judicial recusals and campaign contributions.

### **20.7.8 Filing Locations for Reports – State Candidates and PACs**

All candidates for state office and PACs that seek to influence state elections must file electronically with the Secretary of State. § 17-5-8(a). However, there are some exceptions to this rule, which are discussed later in this chapter.

### **20.7.9 Filing Locations for Reports – Local Candidates and PACs**

Candidates for local office (county or municipal) and local PACs have traditionally filed their reports with the judge of probate. Beginning with the 2018 election cycle, non-municipal local candidates and all local PACs will be required to file their reports electronically with the Secretary of State. Exceptions to this 2018 requirement are discussed later in this chapter. Municipal candidates continue to file their reports with the judge of probate § 17-5-9(e).

## **20.8 Electronic Filing**

### **20.8.1. Electronic Filing Requirements**

The Secretary of State maintains an electronic filing and searchable public database of all campaign contributions and expenditures required to be filed with the Secretary of State. Beginning with the 2018 election cycle, subject to the limited exception discussed below, all state and local PCCs and PACs (other than municipal candidates) must file electronically with the Secretary of State. § 17-5-9(e).

### **20.8.2 Threshold for Electronic Filing**

State candidates or PACs receiving \$5,000 or less per cycle are not required to file reports electronically. § 17-5-8(g). As noted previously, beginning in 2018, non-municipal local candidates and local PACs are required to file their reports with the Secretary of State. It is not clear from the language of the FCPA whether the \$5,000 threshold for reporting electronically applies to non-municipal local candidates in the same way it applies to state candidates and PACs.

If a candidate has not met the filing threshold for the office for which they are running, a waiver of report may be filed to prevent any perception that the candidate is ignoring filing obligations.

### **20.8.3. Designated Filing Agent**

A candidate may also select a designated filing agent when appointing their principal campaign committee. The designated filing agent will be authorized to file all required reports for the candidate during the election cycle. §§ 17-5-2(a)(4) and 17-5-20.

## **20.9 General Provisions for Campaigning**

### **20.9.1 Federal Campaign Filings**

Alabama participates in the Federal Election Commission State Filing Waiver Program. Under this program, campaign finance reports filed with the FEC do not have to be filed with the Secretary of State. Instead, public access to FEC reports is maintained by a system with electronic access to reports and statements.

### **20.9.2 Misrepresentations**

It is unlawful for any person to fraudulently misrepresent themselves as acting in any capacity for a candidate, PCC, PAC, or political party in a manner which is damaging to or is intended to be damaging to another candidate, PCC, PAC, or political party. § 17-5-16(a). There are also restrictions on making “robocalls” (or automated telephone calling service) without properly identifying the person, committee, or political action committee that paid for the call. § 17-5-16(b and c).

## **20.10 Electioneering Communications**

### **20.10.1 Electioneering Communications**

“Electioneering Communications” are regulated under the FCPA. Contributions and expenditures paid for by a person, nonprofit corporation, entity, PCC, or other political committee or entity in connection with any electioneering communication shall be disclosed by

the payor “in the same form and at the same time” required PACs. § 17-5-8(h).

The FCPA defines an electioneering communication as any communication disseminated through any federally regulated broadcast media, any mailing or other distribution, electronic communication, phone bank, or publication which does the following:

- (a) Contains the name or image of a candidate;
- (b) Is made within 120 days of an election in which the candidate will appear on the ballot;
- (c) The only reasonable conclusion to be drawn from the presentation and content of the communication is that it is intended to influence the outcome of an election; and
- (d) Entails an expenditure in excess of \$1,000. § 17-5-2(a)(6).

Churches are exempt from this requirement unless attempting to influence the outcome of an election with expenditures. Trade associations communicating with their members and businesses communicating with their employees are also exempt. § 17-5-8(i) and (j).

### **20.10.2 Campaign Advertisement Disclaimers**

Any paid political advertisement or electioneering communication appearing in any print media or broadcast on any electronic media must clearly and directly identify the entity responsible for paying for the advertisement or electioneering communication. § 17-5-12(a). Such advertisement must give the identification of the person, nonprofit corporation, entity, PCC, or PAC that paid for or otherwise authorized such communication. § 17-5-12(a). Although the advertiser is not limited to the exact words “paid advertisement,” the advertisement must make clear its purpose and contain the full address of the person or group paying for it. A full address includes the name, street or post office box, city, and state. If the advertisement violates this requirement, then the candidate, campaign committee, broadcast company, or all three together may be prosecuted. AG AO 94-0227.

Any card, pamphlet, circular, poster, or other printed material relating to or concerning any election must contain the identification of the person, candidate, PCC, or PAC responsible for the publication, distribution, or display of the material. § 17-5-13. According to the attorney general, when the election concerns a non-candidate election, anonymous printed

material does not violate the FCPA. AG AO 95-0218.

Common areas of public buildings or grounds can be used for press conferences or political advertisements provided access is available to all candidates on an equal basis, subject to reasonable restrictions so as not to interfere with public business. AG AO 98-0211.

### **20.10.3 Exceptions to Disclaimer Requirement**

The FCPA disclaimer requirements for paid political advertisements and electioneering communications do not apply to messages or advertisements:

- (a) Designed to be worn by a person;
- (b) Placed as a paid link on an Internet website, if the message does not exceed 200 characters in length, and the link directs to another Internet website that has a disclaimer;
- (c) Placed as a graphic or picture link where a disclaimer is not practical due to the size of the picture, and the link directs to another Internet website that has a disclaimer;
- (d) Placed at no cost on an Internet website where there is no cost to post content for public users;
- (e) Placed on an unpaid profile account available to the public without charge or a social networking Internet website if the source of the message is obvious from the content or format of the message;
- (f) Distributed as a text message or other message via Short Messages Service if the message does not exceed 200 characters in length or requires the recipient sign up or opt in to receive it;
- (g) Connected with or included in software application where the user actively chooses to access the application from or through a website that has a disclaimer;
- (h) Sent by a third-party from or through a campaign website that has a disclaimer; and
- (i) Contained in or distributed through any other form of technology where a disclaimer is not practical due to its size or nature. § 17-5-12(b).

#### **20.10.4 Robocalls**

Every automated or pre-recorded communication made through an automated telephone dialing service (often referred to as a robocall) must contain a clear notice at the end of the communication stating that it is a paid political advertisement and identifying the person or other entity that paid for the communication. § 17-5-16(b).

#### **20.10.5 Express Advocacy vs. Issue Advocacy**

Political committees are required to file disclosure reports that account for any and all contributions received and expenditures made with a view toward influencing an election's result. § 17-5-8. In determining whether an expenditure or contribution was made with such a view, the Attorney General uses the *Buckley* standard, which distinguishes issue advocacy and express advocacy.

Attorney General's opinions interpret § 17-5-2 as applying to individuals or groups engaged in the express advocacy of a candidate or ballot proposition, i.e., "Vote for." It has never been interpreted to apply to individuals or groups purely debating or advocating political issues in the abstract, i.e., "proposition 'x' is good." While recent federal court decisions have approved Congress' replacement of the *Buckley* standard in the "McCain-Feingold law," the court in *Ctr. For Individual Freedom v. Carmouche*, 449 F.3d 655 (5<sup>th</sup> Cir. 2006) ruled that the *Buckley* test remains the proper construction of state laws regulating election speech, unless the legislature amends the state law to adopt a different test. Given that Alabama has adopted no such law, the *Buckley* standard is still in place. Therefore, the FCPA applies only to communications that expressly advocate the election or defeat of a candidate as defined by the *Buckley* test. AG AO 2007-053. As noted elsewhere in this chapter, some FCPA provisions also apply to electioneering communications.

### **20.11 Penalties for Violations**

#### **20.11.1 Unintentional Violations**

A person who *unintentionally* fails to timely or accurately submit their report shall be subjected to an administrative fine as follows:

- (a) 1<sup>st</sup> Offense – Lesser of \$300 or 10% of amount not properly

reported;

- (b) 2<sup>nd</sup> Offense – Lesser of \$600 or 15% of amount not properly reported;
- (c) 3<sup>rd</sup> Offense – Lesser of \$1,200 or 20% of amount not properly reported; and
- (d) 4<sup>th</sup> Offense in an election cycle shall create a rebuttable presumption of intent to violate the reporting requirements. A 4<sup>th</sup> violation also requires payment of the lesser of \$1,200 or 20% of the amount not properly reported.

### **20.11.2 Intentional Violations**

Unless otherwise specifically enumerated, a person who intentionally violates any reporting requirement of the Fair Campaign Practices Act is guilty, upon conviction, of a Class A misdemeanor. § 17-5-19(b).

A candidate who intentionally violates any section other than § 17-5-7 of the FCPA is guilty of a Class A misdemeanor. § 17-5-19(a).

Any person who intentionally violates § 17-5-7, which addresses limits on candidates receiving campaign contributions and spending campaign money, is guilty, upon conviction, of a Class B felony. § 17-5-19(c).

### **20.11.3 Violations of Electioneering Communication**

Failure to comply with the advertising requirements is a Class A misdemeanor and, upon conviction, is subject to a fine of not more than \$6,000 and/or imprisonment of not more than one year. §§ 13A-5-12 and 17-5-19(a).

### **20.11.4 Contributions from Federal Candidates and Violations**

A candidate who accepts more than \$1,000 from the PCC of a federal candidate is guilty, upon conviction, of a Class C felony. § 17-5-15.1(b).

### **20.11.5 Administrative Penalties (Secretary of State or Judge of Probate)**

Commencing with the 2018 election cycle, the appropriate election official, based on the location of filing, shall levy an administrative penalty against any person who fails to *timely file* a required report and who does not remedy the filing of the required report. The State Ethics

Commission shall have the authority to levy an administrative penalty against any person who files a *materially inaccurate* report and who does not remedy the filing of the report. § 17-5-19.1(a).

### **20.11.6 Distribution of Penalty Funds**

Civil penalties levied shall be paid to the appropriate filing official within 45 days of the finality of any review. All penalties collected by a judge of probate shall be distributed to that county's general fund, and all penalties collected by the Secretary of State shall be distributed to the State General Fund. § 17-5-19.1(e) and (f).

## **20.12 Enforcement of FCPA Civil Penalties**

### **20.12.1 Prosecution of Violations**

The Attorney General or a district attorney may prosecute any person who violates the FCPA. § 17-5-19(d).

### **20.12.2 Late / Inaccurate Reports**

Failure to file a timely report shall not be considered an offense or subjected to a civil penalty so long as it is the first failure by that candidate or PAC for the election cycle and the report is filed within 48 hours of the time it was due. § 17-5-19.1(h).

### **20.12.3 Voluntary Corrections**

A person who voluntarily files an amended report to correct an error in an otherwise timely filed report without being prompted by a filing official shall not have committed an offense or be subjected to a civil penalty under this subsection, so long as, in the case of a candidate, the corrected report is filed prior to the election at issue, and so long as, in the case of a political action committee, the corrected report is filed prior to the close of the calendar year. § 17-5-19.1(g).

## **20.13 Statement of Economic Interests**

Under a 2019 change in the law, candidates at every level of government must file a completed statement of economic interests with the Ethics

Commission within five days of the filing of the candidate's qualifying papers with the appropriate election official. Act No. 2019-529. The candidate does not have to file a second statement of economic interests if a current statement of economic interests is on file with the commission. § 36-25-15(a). Failure to comply with this requirement shall cause the candidate to be deemed not qualified, and his or her name shall not appear on the ballot. § 36-25-15(c). Two recent ethics advisory opinions regarding candidates and these statements are referenced in the Chapter 19 summary of Commission opinions.

The contact information for the Alabama Ethics Commission is as follows:

Alabama Ethics Commission  
RSA Union Building  
100 North Union Street, Suite 104  
Montgomery, AL 36104

P.O. Box 4840  
Montgomery, AL 36103  
<http://ethics.alabama.gov>

## **20.14 Ethics Commission Responsibilities under the FCPA**

The Ethics Commission is responsible for providing guidance and enforcement regarding provisions of the FCPA. The Commission must work with the Secretary of State to implement the reporting requirements of the FCPA. The Commission is also responsible for the following:

- (a) Approving all forms required by the FCPA. § 36-25-4(b)(1).
- (b) Suggesting accounting methods for candidates and PACs. § 36-25-4(b)(2).
- (c) Approving a retention policy for all FCPA reports, filings, and underlying documentation. § 36-25-4(b)(3).
- (d) Approving a manual that will be published by the Secretary of State for candidates and PACs that describes the requirements of the FCPA. § 36-25-4(b)(4).
- (e) Investigating and holding hearings regarding alleged violations of the FCPA. § 36-25-4(b)(5).
- (f) Conducting or authorizing audits of FCPA filings when a complaint is filed or when the existence of a material

discrepancy or conflict is noticed on any filing. § 36-25-4(b)(6).

- (g) Affirming, setting aside, or reducing civil penalties. § 36-25-4(b)(7).
- (h) Referring all evidence and information to the attorney general or appropriate district attorney for prosecution of any criminal violation of the FCPA. § 36-25-4(b)(8).
- (i) Conducting investigations and ordering audits in connection with a complaint or other filing alleging a violation of the FCPA. § 36-25-4(b)(9).
- (j) Issuing and publishing advisory opinions on the requirements of the FCPA. § 36-25-4(b)(10).
- (k) Prescribing, publishing, and enforcing rules to carry out the directives of the FCPA. § 36-25-4(b)(11).

The Commission is only involved in these campaign finance areas and certain ethics disclosure activities with respect to elections. It is not involved with other election activities such as voter registration, absentee or overseas voting, vote counts, or election contests.

