

New Year, New PAC: Have a Successful PAC Audit in 2023

Political Law Podcast

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Transcript

You're listening to Wiley's Political Law Podcast, a series of podcasts about Election Law, Ethics, and Government Investigations. In each podcast, attorneys at Wiley, a Washington D.C. law firm, break down an aspect of the political law landscape with our unique insight into issues faced by our clients.

Mark Renaud

Hello, it's Mark Renaud of Wiley's Election Law and Government Ethics group, and I welcome you to our first podcast of the year on the Election Law channel at Wiley's group of podcasts. Today, we're going to talk just briefly about PAC audits. Federal PACs have their year-end, or 2022 report due on January 31, and that will close the books for the year and for the cycle for those PACs. We in the Election Law group, we recommend that federal PACs have some sort of audit every two years and most of our client PACs have in their bylaws that they are going to audit every two years. Those kinds of audits could take lots of different forms.

One is just a pure financial audit where outside and/or inside auditors basically confirm that nobody is inappropriately taking cookies out of the cookie jar, so to say, and that you know everything

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that the PAC said came in fact, went into the bank, and everything they said went out, went out of the bank. It's a very straightforward audit, and again, getting done both by your internal auditors – I have a client that says that the internal auditors, their first line of training is to audit the PACs. Hopefully, that doesn't happen to you, but your outside auditors also can do it as well, but you don't have to go out and necessarily find a special auditor or hire an outside auditor specifically to do those kinds of audits.

The second kind of financial audit is one that is done with a specialized FEC-trained accountant, a Federal Election Commission trained accountant, or accounting firm. Those folks, they provide a little more value to the folks who run the federal PAC because they're going to audit the PAC to make sure that nobody's taking anything out of the cookie jar inappropriately, but they're also going to audit it with respect to the FEC rules about excessive contributions, about depositing contributions within ten days of receipt, and things like that and that can be very helpful. They can provide some insight especially for large PACs where there are lots of goings and comings, and there might be a number of amendments over the year or two – over the cycle – and places where the PAC obviously knows what had happened here during the election law cycle, but it would be good to have an auditor and make sure that everything is buttoned-down.

The third type of audit on which we're going to spend a little bit more time is a process audit, and that's because those audits are with attorneys like me and some of my other colleagues in Wiley's Election Law and Government Ethics group. And these audits, although we can oversee financial audits done by accountants and often do for privilege purposes, these kind of process audits are with respect to how the PAC is running with respect to the law, with respect to just practical aspects, or benchmarking against what other PACs and the industry are doing. It's not necessary to do that every two years but every four years or so, when you have a change in PAC board, or when you have a change in PAC Director or management where folks want to make sure that everything's on the up and up – that's when it's a good time to do a process audit in addition to a financial audit of one type or another. This audit is backwards looking because that's the only data attorneys or others looking at it would have but the function is to make sure that going forward everyone is on the same page, and that the page is legally compliant. After the audit, if amendments are needed because of problems with how the PAC was run, that's obviously going to be helpful that the PAC has undertaken the audit but again, going forward is what the real focus of the audit is for, or the purpose of the audit. Obviously for those running the PAC, it's good to have it in a in good shape and be verified by an auditor, either financial or process or both, but a clean or a relatively clean audit report also gives assurance or reassurance to the PAC's two biggest constituencies.

First, your contributors; you want to trumpet a clean audit report to your contributors to show that in addition to all the transparency that's built in to the Federal Election Campaign Act that regulates how the PAC reports everything that it brings in and everything that it disperses, that you're also run in a manner such that there are no inappropriate items or other legal problems with the PAC and that reassurance through your contributors, over time, we've seen that that helps increase contributions and makes people more likely to have favorable views used towards the PAC and PAC's activities.

The second constituency for those audit reports is your senior corporate executives and/or the board of directors of the company, depending on who's overseeing it and how granular your trade association or your corporation [is]. You know those folks want to make sure that they don't have any legal risk, and that the PAC's being running in a way that's not going to cause them any embarrassment or public relations issues, in addition to not causing them any actual legal issues. With respect to the process audit, it's backwards looking. When you do one of those audits, you're going to want to look at a number of things in the PAC and that's what we would do here at Wiley's Election Law and Government Ethics practice.

We start at the top, look at the bylaws—no, bylaws aren't required—but we do recommend that every federal PAC have a set of bylaws, whether the PAC is large or the PAC is more modest in size. At the audit stage, your question is, first, of all, you know if you don't have them, you want to create some, but second is do they work? Do they make practical sense? How do they compare to what others are doing and are people following them? Because again, we'd want to talk to some of your employees and people working on the PAC to make sure that even these great process ideas and/or legal prohibitions or requirements that are recited in the bylaws, they're not really good for anything if nobody follows them. We want to make sure that people are following and of course, that they work and other than what is a legal prescription or prohibition, the bylaws otherwise can be written in a way to accommodate the company's culture and the availability of outside counsel or inside counsel or the like. They can be altered if they're not being followed because they're not practical just based on the circumstances of the company and its PAC.

The same goes with the next layer which will be the written procedures for the PAC that wouldn't be in the bylaws or in articles of association, but would identify what needs to be done, who needs to do it inside the corporation or the trade association, who is responsible and what their responsibilities are. Written procedures can be benchmarked against what others do—that's one of the advantages that we have because when you work with so many PACs and you know are they practical? Are they workable? Do they remind people of their legal obligations or prohibitions in the appropriate part, and again, are they being followed? Lots of companies have lots of procedures and hopefully they're auditing those procedures with other people with relevant experience, but in the election law space, we don't want to have a bunch of procedures down that are clear and in the records of the company but then not being followed by those out running the PAC.

In a process audit, the next level, and of course, they're not always in this order, would be looking at some solicitations. What are you saying about the PAC – that's more of an art than a science necessarily. But when you ask for money, are you putting the disclaimers on, etc.? When you have newsletters or other kinds of communications, do they rise to the level of being a solicitation? Of course, those who run PACs, they know what rises to the level of solicitation. That's when they've got to make sure that the disclaimers are right and yes, we're going to look at the wording of those disclaimers and maybe even the type size if we get lucky, but the fact is that the other aspect of the solicitation would be whether or not it's only going to the restricted class.

That itself is another issue that needs to be looked at every number of years—are the people who are eligible to be solicited for the PAC and actually are being solicited for the PAC, do you have that determined right? Have things changed? Is everyone in agreement with where on the [organization] chart was cut off so that you

don't have any improper solicitations? Foreign National restrictions, that's part of the restricted class issues; you can't solicit foreign nationals for contributions to any candidate [or PAC], much less a federal PAC, so that needs to make sure that that's being followed—what are your procedures with respect to that? How do you deal with your bank accounts?

Another area, a PAC match, a lot of PACs and our clients use a charitable match program. It's not particularly complicated but you need to make sure that people are following the procedures and that contributors know what they're signing up for and that companies [or trade associations] are following through. Part of what you look at in the process audit is also training our folks who are running the PAC. Do they have the right training? Do they need additional training? If you're a larger PAC, or if you're a trade association PAC that has some further hoops like prior approval, are people knowledgeable about that and are they following through? Do they need to go to a class with the FEC (Federal Election Commission)? Do they counsel me to come in and talk to a group, especially if you have more dispersed folks raising money? We want to make sure everybody is on the same page with respect to who can be solicited and what those solicitations are going to say.

Finally, but obviously not least, are the FEC reports themselves. A process audit, although not financially auditing the PAC, we're going to look at some of the reports and make sure that proper designations are there, proper information, how payroll deductions are working, other kinds of solicitations and contributions, how they feed into the reports. On the reports, the FEC rules are complicated enough but a lot of our clients and a lot of the PACs that we look at use the Federal PAC to make contributions at the state and sometimes the local level to non-federal candidates and so that, depending on the jurisdiction, can implicate a whole different set of rules. For example, in Texas if you keep your inside Texas contributions less than 20% of your total contributions in a 12 month period and so that would be federal and non-federal on the Texas-side, then you can report that you're an out-of-state PAC and have different requirements than if you go above that level and then you have to file as a regular Texas PAC. The states all vary—some places, they just don't care because you're a federal PAC, they know where to find your information on the FEC's website, but other places of course, federal PACs are prohibited in some states but other places they make you go through the hoops. Either special hoops for federal PACs or just the regular hoops for any given state PAC that will come your way.

Now's a good time at the beginning of 2023, which is when I'm recording this podcast, it's a good time for folks who run federal PACs to think about getting an audit of one type or another so to make sure that there are no issues about improper disbursements by the PAC, improper record keeping, improper handling of money, and also to bring your PAC up into a level that corresponds to what your peers are doing, and makes it practical given the situation at your trade association or at your company. So, with that I appreciate you listening in today and hope this has been helpful for you and running your PAC.

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