Chapter I: Lobbying and Political Activities by 501(c)(4)s

THE CONNECTION

Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations

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CHAPTER I: LOBBYING AND POLITICAL ACTIVITIES BY 501(C)(4)S

This chapter discusses the laws governing advocacy by 501(c)(4)s, demonstrating some of the strategic reasons for creating a 501(c)(4). Often, a 501(c)(3) will be the original or "anchor" organization with more members and greater financial resources, at least initially, than the (c)(4). However, a 501(c)(4) may also serve as the anchor organization with an affiliated 501(c)(3) organization to raise tax-deductible contributions for limited purposes.

A. WHAT IS A 501(C)(4)?

A nonprofit corporation or association designed to promote social welfare may qualify for tax-exempt status under IRC section 501(c)(4). The IRS has recognized a variety of public policy issues as promoting "the general welfare of the community," such as environmental protection, firearms control, women's rights (including reproductive rights), poverty, housing, and civil rights. Groups such as the League of Women Voters, the National Organization of Women, the Human Rights Campaign, the Sierra Club, and the American Civil Liberties Union are 501(c)(4)s. While 501(c)(4)s are exempt from paying federal income tax, contributions and membership dues to a 501(c)(4) are ***not*** tax-deductible as charitable contributions.

Contributions and membership dues to a 501(c)(4) are not tax-deductible as charitable contributions.

A 501(c)(4) may engage in an unlimited amount of lobbying, as long as the issues relate to the exempt purposes of the organization. In addition, a 501(c)(4) may engage in some partisan political campaign activities in accordance with federal and state campaign finance laws, provided that its political activities do not become its primary activity.

Tax law requires that tax-exempt organizations, including 501(c)(4)s, benefit the general public, not a private group of citizens. Applying this standard, the IRS has contested the tax-exempt status of groups that it contends are operated primarily to benefit one political party, arguing that conveying more than an insubstantial benefit to a party constitutes private benefit.[1] For example, in *American Campaign Academy v. Commissioner*,[2] the Tax Court accepted the IRS's argument that a political training academy whose trainees were placed almost exclusively in Republican campaigns did not qualify for exempt status under section 501(c)(3) because the academy provided more than an insubstantial benefit to the Republican Party. Similarly, the IRS denied tax-exempt status to several groups that had been organized to recruit and train women to run for political office. The IRS took the position that the groups were not operated primarily to promote social welfare because their activities were primarily for the benefit of a political party and a private group of individuals, rather than "the community as a whole."[3] While it is unclear at this time how the private benefit doctrine will ultimately be applied to 501(c)(4)s, this issue must be considered in organizing and operating a social welfare organization.

B. FEDERAL RULES ON LOBBYING ACTIVITIES BY 501(C)(4)S

1. Tax Code

A 501(c)(4) may conduct unlimited lobbying without jeopardizing its tax-exempt status as long as the legislation that the organization attempts to influence pertains to the purpose for which it was formed. Lobbying may be its sole activity. Specifically, lobbying includes:

- drafting legislation;
- persuading legislators to introduce legislation;
- circulating lobbying materials to assist in the passage or defeat of a bill;

- engaging members and the general public by letter, phone, or the mass media to encourage their legislators to support or oppose legislation; and
- supporting or opposing referenda, initiatives, and other public ballot measures.

Before proceeding with these activities, however, it is important to check federal, state, or local lobbying disclosure laws and, in the case of ballot measure activity, disclosure laws for any registration and reporting requirements.

A 501(c)(4) must notify prospective contributors that their contributions are not deductible as charitable contributions.[4] This notice must appear in all written and oral solicitations. The IRS provides various examples of acceptable language for the notice regarding non-deductibility of contributions, including, "Contributions and gifts to [name of organization] are not tax deductible." There are penalties for each failure to include the notice.

If an organization's primary purpose or activity is partisan political activity, the organization does not qualify as a 501(c)(4).

Although some taxpayers may, in some circumstances, deduct their dues and "similar amounts" paid to a 501(c)(4) organization as an ordinary and necessary business expense, the portion of dues that funds lobbying and political expenditures is not tax-deductible.[5] A 501(c)(4) organization may be required to alert its members about what percentage of dues, if any, it has allocated to lobbying and political expenditures.[6] If the organization fails to give this notice, or if it provides a notification that underestimates the percentage of dues used for these purposes, the IRS may impose a tax on the organization equal to 35 percent of its lobbying expenditures.[7]

A 501(c)(4) is exempt from this notice requirement if:

- 90 percent of all dues and contributions are received from persons or entities paying less than $103; or
- 90 percent or more of the membership dues to the organization come from nonbusiness sources and are, therefore, nondeductible in any event.[8]

2. Federal and State Lobbying Disclosure

The Lobbying Disclosure Act (LDA) requires organizations that lobby the federal government to register and report their lobbying activities. Information about these registration and reporting requirements is more fully presented in Appendix A.[9] Similar disclosure laws may exist on the state and local level. Summaries of many of these state laws are available on the Alliance for Justice website, BolderAdvocacy.org at http://bolderadvocacy.org/navigate-the-rules/state-resources.

One noteworthy provision of the LDA applies exclusively to 501(c)(4)s, stating that a 501(c)(4) that engages in lobbying activities is not eligible to receive federal grants, loans, or awards.[10] Conversely, a 501(c)(4) that receives federal grants, loans, or awards may not lobby. Therefore, an organization should conduct a thorough review of its activities to determine if it must choose between lobbying or accepting federal money. The LDA does allow a 501(c)(4) to form a separate, affiliated 501(c)(4) organization to lobby with private funds.[11] Moreover, a 501(c)(4) that conducts lobbying may establish a separate 501(c)(3) to receive federal grants and conduct charitable activities.

C. RULES ON 501(C)(4) POLITICAL ACTIVITY UNDER THE FEDERAL TAX CODE

The primary purpose of a 501(c)(4) must be to promote social welfare, and the IRS has ruled that participation in political campaigns does not qualify as an activity that promotes social welfare.[12] Therefore, if an organization's primary purpose or activity is partisan political activity, the organization does not qualify as a 501(c)(4).[13] Partisan political activities are those that support or oppose a political party or candidate for public office. See "What Is 'Political Activity'?" below.

In addition to this primary purpose restriction, 501(c)(4) organizations that have investment income may be subject to tax on expenditures for their political activities, unless they conduct these political activities through a "separate segregated fund" organized under IRC section 527. See Chapter IV for a discussion of establishing and operating a separate segregated fund.

1. What Is the Primary Purpose of an Organization?

No clear test exists for determining when political activity becomes an organization's primary purpose. One common approach is to analyze expenditures. If annual political expenditures are relatively small compared to the organization's overall budget, its tax-exempt status is generally safe. If political activity expenditures exceed 50 percent of total program expenditures, however, social welfare most likely cannot be deemed the primary purpose.[14] In order to be cautious, a 501(c)(4) should generally ensure that its expenditures for political activity do not exceed 30 to 40 percent of its total budget. The IRS may also consider other factors, in addition to expenditures, to determine whether an organization is primarily engaged in promoting social welfare or political activities, including:

- the staff and other resources (including buildings and equipment) devoted to conducting the organization's social welfare versus political activities;
- the manner in which the activities are conducted; and
- the amount of time spent by both volunteers and staff on political activities.[15]

2. What Is "Political Activity"?

Any activity is considered political if it is conducted to influence the election, selection, nomination, or appointment of any individual to a federal, state, or local public office; to an office in a political organization; or as a delegate or elector for President or Vice President.[16] Such activities include:

- endorsements of a candidate;
- publication or distribution of statements in favor of or in opposition to a candidate;
- direct financial contributions or other support to a candidate, political party, or PAC (other than a ballot measure committee);
- in-kind contributions to a candidate, political party, or PAC (other than a ballot measure PAC) including, but not limited to:
  - mailing, membership, or donor lists or other resources for fundraising;
  - provision of facilities or office space;
  - staff time;
  - polling results;
  - organizing volunteers for the campaign;
  - opposition research;
  - comparative ratings of candidates;
  - publicizing names of political candidates who support or oppose the organization's position on public issues;
- membership communications expressly advocating the election or defeat of a candidate; and
- payment of the administrative and fundraising costs of a political organization.

There are election-related activities that are *not considered political activities* under the IRC. These activities may be conducted freely without affecting a 501(c)(4)'s tax-exempt status if they relate to its primary purpose. Such activities include, first, voter education and engagement activity, including candidate questionnaires and debates, issue education projects, get-out-the-vote programs, and voter registration, *as long as they are conducted in a nonpartisan manner—that is, if they do not support or oppose candidates or political parties*.[17] In addition to this requirement, there may be federal or state campaign finance rules that govern these activities. The IRS has published information about these and other types of voter education and registration activities, including a Fact Sheet, FS 2006-17 (February 17, 2006). In addition, Revenue Rulings 2006-4 and 2007-41 provide guidance on distinguishing political and nonpartisan advocacy communications (see below).

Also permissible for 501(c)(4)s are activities such as workshops, publications, and seminars to encourage greater participation in government and politics or better campaign practices, as long as they do not support or oppose a candidate or political party.

There are election-related activities that are not considered political activities under the IRC.

3. Distinguishing Lobbying Communications from Political Communications

Distinguishing lobbying communications or other issue advocacy from political communications has become critical for many advocacy organizations, because 501(c)(4) organizations could violate their 501(c)(4) status if they primarily conduct political activities and may be taxed on any such political activities. In contrast, lobbying activities are permitted to be the primary activity of a 501(c)(4) entity, and the organization is not taxed on its lobbying activities.

Factors tending to indicate that an advocacy communication on a public policy issue is a *political activity* include:[18]

- the communication identifies a candidate for public office;
- the timing of the communication coincides with an electoral campaign;
- the communication targets voters in a particular election;
- the communication identifies a candidate's position on the public policy issue that is the subject of the communication;
- the position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
- the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue. It is not clear from the regulations how many ads must be run to establish the pattern of "an ongoing series of substantially similar advocacy communications," or how a new organization could satisfy this requirement.[19]

Factors tending to indicate that the advocacy communication is a *lobbying activity* include:

- the absence of one or more of the factors listed above indicating that the activity is political;
- the communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
- the timing of the communication coincides with a specific event outside the organization's control that the organization hopes to influence, such as a legislative vote or a committee hearing;

- the communication identifies the candidate solely as a government official in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and
- the communication identifies the candidate solely in a list of key cosponsors of the legislation that is the communication's focus.

Many of the factors are ambiguous. Moreover, most situations include a combination of these factors, with some pointing toward classifying an activity as political while others militate against that classification. The mere presence of a single factor is not determinative; the IRS examines the facts and circumstances of the activity as a whole. Particularly after the *Citizens United* decision, which permits corporations to make independent expenditures, there has been increasing pressure on the IRS to enhance its scrutiny of 501(c)(4)s that engage in political activities.[20] For these reasons, 501(c)(4) organizations need to be cautious in how they apply the primary purpose test to these activities.

The following examples are adapted from fact patterns provided in IRS Revenue Ruling 2004-6[21] and modified to apply to PEN, the hypothetical 501(c)(4) organization featured in this guide.

Example:

Senators A and B represent Maine in the U.S. Senate, and Senator A (but not Senator B) is up for reelection in 2012. PEN buys full-page newspaper ads in several large Maine newspapers on a regular basis in 2012, urging more spending on the environment, which would require a legislative appropriation. One of the ads, published shortly before the election, stresses the importance of increased federal funding for environmental protection and cites statistics about Maine's environmental problems, but it does not mention Senator A's position on environmental issues. The ad ends with the statement, "Call or write Senator A and Senator B to ask them to support more federal money to protect our environment." The environment has not been raised as an issue distinguishing Senator A from any opponent. At the time when the ad is published, no legislative vote or other major legislative activity is scheduled in the U.S. Senate on changing federal funding for environmental protection.

IRS Analysis: The circumstances indicate that the expenditure for these ads is a lobbying activity, not a political activity, for PEN. Although PEN's ad identifies Senator A shortly before an election in which that Senator is a candidate, the ad is part of an ongoing series of substantially similar advocacy communications on the same issue during the year. The advertisement identifies both Senator A and Senator B (who is not a candidate in that election), it does not identify Senator A's position on environmental issues, and the environment has not been raised as an issue distinguishing Senator A from any opponent. Therefore, the ad does nothing to indicate that Senator A's candidacy should be supported or opposed on this issue.

Example:

Senator C represents Texas in the U.S. Senate and faces a challenge in his party's primary. Shortly before the primary election, PEN buys several full-page ads in Texas newspapers stating that the environment is important to Texans and that S. 24, a bill pending in the U.S. Senate, would clean up air pollution. The ad also states that Texans with asthma would benefit from cleaner air, but that Senator C has opposed similar measures to reduce air pollution in the past. The advertisement ends with the statement, "Call or write Senator C and tell him to vote for S. 24." The environment has not been raised as an issue distinguishing Senator C from any opponent. S. 24 is scheduled for a vote in the U.S. Senate before the election, soon after the date on which the advertisement is published.

IRS Analysis: Under the facts and circumstances, PEN's advertisement is a lobbying activity. It addresses legislation that PEN is supporting and appears immediately before the U.S. Senate is scheduled to vote on that particular legislation. The candidate identified, Senator C, is a government official in a position to take action on the public policy issue in connection with a specific event (the vote), the timing of which is outside the organization's control. The IRS should consider this to be a bona fide effort to lobby Senator C to vote for the legislation, not to influence the election.

Example:

Senator D represents Wyoming in the U.S. Senate. PEN buys full-page newspaper ads in Wyoming that are published repeatedly, beginning shortly before an election in which Senator D is a candidate for reelection. The advertisement is not part of an ongoing series of substantially similar ads by PEN on the same issue. The ad states that a major Wyoming city needs a water treatment plant, but that it cannot be built without federal aid. The ad further states that Senator D has voted in the past year for two bills that would have provided the federal funds needed for the water treatment plant. The ad ends with the statement, "Let Senator D know you agree about the need for federal funding for water treatment plants." Federal funding for water treatment has not been raised as an issue distinguishing Senator D from any opponent. At the time when the ad is published, a bill providing federal funding for water treatment has been introduced in the U.S. Senate, but no legislative vote or other major legislative action on the bill is scheduled.

IRS Analysis: Under the facts and circumstances, the advertisement is a political activity, not a lobbying activity. PEN's ad identifies Senator D, appears shortly before an election in which D is a candidate, and targets voters in that election. Although federal funding for water treatment plants was not raised as an issue distinguishing Senator D from any opponent, the ad identifies Senator D's position on the issue as agreeing with PEN's position, and it is not part of an ongoing series of substantially similar advocacy communications on the same issue. Additionally, the ad does not identify specific legislation and is not timed to coincide with a legislative vote or other major legislative action on the issue. The IRS would consider this ad to be an attempt to influence Senator D's reelection, not a bona fide attempt to conduct grassroots lobbying to influence Senator D's vote on the legislation.

4. Tax on Political Activities

A 501(c)(4) may be subject to a tax on expenditures made for political activities. Under IRC section 527(f), the tax is imposed at the highest corporate rate on the lesser of:

- the organization's annual net investment income (income from interest, dividends, rents, and royalties, and the gains from sale or exchange of assets minus the losses for such assets and investment management expenses); or
- the aggregate amount expended on political activities during that year.

A 501(c)(4) is required to report its political expenditures on the Form 990 (see below) and to file an IRS Form 1120-POL if it has $100 or more in both net investment income and political expenditures ("exempt function" expenditures). A 501(c)(4) may pay for certain expenses permitted by the Federal Election Campaign Act and similar state election laws, such as express advocacy communications with "members" and the costs of establishing, administering, and fundraising for a PAC, without incurring a tax.[22] These expenditures do, however, count in determining the organization's primary purpose.

A 501(c)(4) is required to report its political expenditures on the Form 990.

A 501(c)(4) organization may minimize or avoid this tax on political campaign expenditures by forming a separate segregated fund—either a PAC or a 527 organization—to conduct political activities. It is important to be aware, however, of the consequences of conducting political activities through a political organization, as described in Chapter III.

5. Reporting Political Activities to the IRS

The IRS Form 990 requires a 501(c) organization to report certain information about its political expenditures. The core form asks whether the reporting organization engaged in "direct or indirect political activities" on behalf of or in opposition to candidates for public office. If the organization engages in independent expenditures, member communications, fundraising, or administrative activities for a separate segregated fund or other exempt function activities, it should respond "yes" to this question and complete Schedule C of the Form 990.

Part I-A, line 1 of the Schedule C requests a description of the "direct and indirect political campaign activities" that the 501(c) undertook in the reporting period. The description should include a brief explanation of the political activities undertaken by the 501(c) only, not those of a separate segregated fund or other PAC. If the 501(c) pays for the administrative and/or fundraising costs of its PAC, that should be mentioned in the description. Line 2 asks for the total amount of money spent by the 501(c) for all of these activities. Line 3 requests the total number of hours that volunteers for the organization expended on political activities. Any reasonable method may be used to estimate these hours. Hours expended on behalf of any related PAC should not be included.

Part I-C asks a series of questions about more limited political activities, only those activities that constitute "exempt function" activity as defined by IRC section 527. The types of expenditures that would be reported on line 1 of this section are independent expenditures and any direct or in-kind contributions made by the 501(c). Expenditures for member communications (see Chapter I, § D(3)), administrative and fundraising costs for a separate segregated fund, and other indirect expenditures would not be reported on this line. Any funds transferred to another political party or political committee that is not a separate segregated fund must be reported on line 2. Finally, the reporting organization must indicate whether it filed a Form 1120-POL and list the name, address, and employer identification number of any political organization to which it made payments, including those "direct and prompt" transfers to its own separate segregated funds. See Chapter 4, § A(4).

D. RULES ON 501(c)(4) PARTICIPATION IN FEDERAL ELECTIONS AFTER *CITIZENS UNITED*

The Federal Election Campaign Act (FECA) regulates the financing of and participation in *federal* elections. Therefore, any activity that involves spending in connection with a federal election should be reviewed to ensure that it is permitted under the FECA even if it is permitted under tax law. The FECA has different standards from the Internal Revenue Code for determining what constitutes electoral activity.

In 2010, the Supreme Court struck down governmental restrictions on corporations', including nonprofits', spending general treasury funds for independent public communications that "expressly advocate" the election or defeat of clearly identified federal candidates and those that qualify as "electioneering communications." (See Chapter I, § D(6) below for discussion of electioneering communications.[23]) Prior to *Citizens United*, virtually all corporations were prohibited under federal law from engaging in express advocacy to the general public.[24] While corporations could spend funds on independent public communications with election-related messages, they could not engage in express advocacy in these communications. They could also communicate with their bona fide members on any subject including express advocacy. (See Chapter 4, § B(7).) The *Citizens United* decision permits 501(c)(4)s to make independent expenditures but did not change the limits on political activities imposed by the tax rules. Remember that political activities may not be a 501(c)(4)'s primary purpose and that expenditures for these activities may be subject to taxation under section 527(f).

FECA has different standards from the Internal Revenue Code for determining what constitutes electoral activity.

As of the publication date of this guide, the FEC has not revised its regulations to reflect the changes resulting from *Citizens United*. The Commission has announced, however, that it will not enforce regulations that are inconsistent with the decision[25] and has undertaken a rulemaking to consider how to conform its regulations with *Citizens United* and other new developments.[26] The FEC's failure to revise the regulations to reflect recent court decisions creates uncertainty with respect to some of the activities discussed below. As a consequence, even though the statute and regulations may state otherwise, certain activities are permitted following *Citizens United* and other decisions. The following sections describe activities in which corporations may engage and the associated reporting requirements.

Note: Without further clarification from the FEC, however, the rules governing some activities are not clear, and the areas of uncertainty are noted as necessary below.

1. Corporate Contributions to Federal Candidates Are Prohibited

Even after *Citizens United*, the FECA prohibits corporations, including nonprofit corporations,[27] from making contributions with general treasury funds[28] to support the election or defeat of a federal candidate.[29] Contributions include direct and indirect payments (including distributions, loans, advances, deposits, or gifts) of money, services, or *anything of value* that go to benefit any candidate, political committee, or party organization.[30]

Under this general rule, a nonprofit corporation such as a 501(c)(4) may not:

- contribute directly to a federal candidate, a Federal PAC, or a political party; or
- make in-kind contributions to a federal candidate, political party, or Federal PAC by providing goods or services at no charge or at less than fair market value, including, but not limited to, mailing, membership, or donor lists; paid staff; travel and living expenses; or radio or television ads that are coordinated with the candidate or candidate's campaign. (For a more detailed discussion of coordination see Chapter I, § F.)

A 501(c)(4) may, however, contribute to a Super PAC. See Chapter V.

2. Independent Expenditures Are Permitted Under *Citizens United*

After *Citizens United*, corporations, including 501(c)(4) organizations, may pay for independent expenditures that expressly advocate the election or defeat of a clearly identified federal candidate. These communications include broadcast, cable or satellite communications, outdoor advertising (such as billboards), magazine and newspaper ads, mass mailings, or telephone banks, as well as electronic communications such as emails and websites.[31]

In determining whether a communication is express advocacy, the FEC considers whether:

- a communication uses phrases to urge the election or defeat of a clearly identified candidate, such as "vote for", "defeat," or "support your Democratic nominee." Other examples of express advocacy would include such phrases as "vote Obama", "vote pro-choice" with a list of names or photographs of candidates supporting or opposing choice, or "reject the incumbent"[32]; or
- the communication as a whole, considering its proximity to an election, could only be interpreted by a reasonable person as urging the election or defeat of a candidate "because (1) the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates."[33]

Independent expenditures are not subject to campaign finance limits. However, to be "independent," the expenditures must be made *without any cooperation, consultation, or request* from candidates, their authorized committee, or a political party. Cooperation or "coordination" exists when the 501(c)(4) making the independent expenditure or electioneering communication has interacted with the campaign in particular ways. One common way for an expenditure to be impermissibly "coordinated" occurs when an organization airs a television or radio ad at the request or suggestion of a candidate or campaign. Cooperation will also exist if the organization has substantial discussions with the campaign about an expenditure or if the organization informs the campaign about a planned communication related to the campaign and the campaign signals its agreement with the suggestion to make that communication. (See Section H(1) of this chapter for a more detailed discussion of coordination.)

a. Special note: Voter registration and get-out-the-vote activities

Under *Citizens United*, a corporation may distribute voter registration and get-out-the-vote (GOTV) communications that expressly advocate the election or defeat of a federal candidate, as long as the voter drive is not coordinated with any candidate, campaign, or political party. It is less clear, however, whether corporation is permitted to sponsor a voter registration or GOTV drive that includes express advocacy and provides transportation to the polls. As of the date of this guide's publication, although the FEC has not resolved whether a voter drive that includes both speech *and* transportation to the polls or registrar falls outside the ruling in *Citizens United,* the issue is under consideration.[34]

Like a 501(c)(3), a 501(c)(4) may also distribute to the general public informational materials about registration and voting that have been produced by official election administrators. These materials include, for example, official registration-by-mail forms and absentee ballots, subject to applicable state law. A 501(c)(4) may also donate funds to state or local government agencies that administer elections to help in offsetting the cost of printing or distributing forms or information on registration or voting.

Note: An organization may not give money or any other benefit to individuals as an incentive or reward for registering to vote or for voting.[35] Many states have additional

rules governing voter registration and GOTV that should be reviewed prior to conducting any such program.

b. FEC reporting requirements for corporations making independent expenditures

While corporations may make independent expenditures without organizing and registering a PAC, they are required to report[36] aggregate independent expenditures over $250 relating to a specific race on FEC Form 5 ("Report of Independent Expenditures Made and Contributions Received"). The report must list any contributor who gave an aggregate amount over $200 specifically for the purpose of furthering the reported independent expenditures.[37] Contributions given with specific instructions for use are commonly referred to as "earmarked." The organization need not list contributors who do not earmark the funds for (or make the contribution "for the purpose of furthering") independent expenditures. On Form 5, the organization must also list every individual and entity who was paid more than $200 in the aggregate during a calendar year in connection with independent expenditures.[38]

In addition to the periodic reports, corporations must report within 48 hours of the date of dissemination of the communication whenever total independent expenditures relating to a specific race in an election cycle reach $10,000 in the aggregate.[39] Within the final 20 days before an election, the threshold amount drops to $1,000, and the reporting period shortens to 24 hours.[40] Contracts obligating funds, as well as actual disbursements, must be included in all reports.[41]

3. Communications to Members and Restricted Class

A 501(c)(4) is permitted to expressly advocate the election or defeat of clearly identified federal candidates in communications directed to its members, executive and administrative personnel, and their families, and these communications may be coordinated with the candidate or campaign.[42] "Member communications" remain an important option even after *Citizens United* for several reasons. Most importantly, member communications may be coordinated with the candidate or political party that is the subject of the communication. In addition, the expenses associated with communications to members are not treated as "contributions" or "expenditures" under federal law and are not subject to the political expenditures tax under IRC section 527.

Under this exception:

- Communications must be strictly limited to bona fide members, executive and administrative personnel, and their families. (See Chapter IV, § C(7) for a more detailed discussion of members and membership organizations.)
- Communications to members may be coordinated with candidates, campaign staff, and political parties.
- Member communications may include phone banks, letters, meetings, publications to members, a members-only website, or any other correspondence that can be directed specifically to individual members. If the communication is circulated beyond the membership, it would be considered a contribution or independent expenditure, depending on whether or not the communication is coordinated with a candidate or political party and a vote in the upcoming election.
- The communications must state the organization's view and must not simply republish a candidate's campaign materials.
- Communications to members may expressly advocate the election or defeat of clearly identified candidates. They may also suggest that members register with a particular political party.

For example, endorsements and candidate appearances are frequently conducted as membership communications.

a. Endorsements Coordinated with a Candidate

If a 501(c)(4) wishes to endorse a candidate and coordinate that announcement with the candidate's campaign, the endorsement may be made through a membership-only communication. The endorsement may be coordinated with the candidate and announced in the organization's newsletter or other publication, as long as the distribution is restricted to members and a small number of nonmembers. (See the discussion of candidate appearances and associated press releases below.) There is no clear rule as to what constitutes a "small number" of nonmembers, but the FEC, the agency that enforces the FECA, has reviewed in some specific cases the absolute number of nonmembers receiving the publication as well as the percentage of the total circulation that they represent. For example, the FEC ruled that 13.7 percent (or more) of total circulation to nonmembers is more than a small number.[43]

Endorsements announced to the general public must comply with the rules governing independent expenditures.

Endorsements announced to the general public must comply with the rules governing independent expenditures. (See Chapter 3, § B(2).) Any public announcement through a press conference or any other means, however, may not be coordinated with the candidate or the campaign. Therefore, the endorsed candidate may not appear or be consulted about the event.

b. Candidate Appearances

A 501(c)(4) organization may also invite a candidate, a candidate's representatives, and political party representatives to address its membership without making an impermissible contribution.[44] There is no requirement to invite all candidates. The organization may invite only the candidate it supports or favors or the representative of one political party while excluding all others.

The sponsoring organization may announce its support for the candidate or party, and it may urge members to contribute, as long as the organization does not facilitate support by *collecting* the contributions for that candidate.[45] The candidate or representative may solicit and accept contributions for the campaign or political party before, during, or after the event.

Media representatives, including newspaper and broadcast reporters, may be invited. Advance information regarding the appearance may be sent to the media through a press release. In addition, a limited number of invited or honored guests other than the organization's membership and the staff required to oversee the meeting may also attend the candidate's appearance. If more than one candidate for the same office (or their representatives) or a party representative addresses the membership, and if the media are invited to one of those individuals' appearances, the organization must allow the media equal access to cover all of the appearances.

If an organization invites its employees, other than administrative and executive personnel and their families, to attend an appearance by a candidate or political party representative, additional restrictions apply.[46] First, candidates may advocate their election, but the organization, its PAC, and its employees may not. Second, while candidates may solicit funds for their campaigns during an appearance, they may not accept contributions at the event, although they may give the audience campaign materials and preaddressed envelopes for contributions. Third, if the organization receives a request from another candidate seeking the same office, it must make equal time and a similar location available to any candidate who wishes to appear. Finally, if a party representative is permitted to address employees, the organization must give

equal opportunity to representatives of other parties. As with member-only events, the organization must allow the media to cover candidates' appearances on an equal basis.

While the organization may consult the candidate on the structure, format, and timing of the appearance, if the organization is planning to conduct independent expenditures in the future it should not request information on or discuss the candidate's campaign plans, projects, or needs beyond the scope of the appearance. These more extensive discussions may run afoul of the coordination rules discussed in Chapter I, § E.

c. Joint Membership Events

Two or more membership organizations may conduct a joint conference call or meeting of their memberships with a federal candidate and split the costs on an actual or closely approximated pro-rata basis as long as the organizations do not advocate the candidate's election during the event.

If the organization is planning to conduct independent expenditures in the future it should not request information on or discuss the candidate's campaign plans, projects, or needs beyond the scope of the appearance.

The FEC ruled that three incorporated 501(c) organizations could jointly sponsor a series of teleconferences with presidential candidates in which participation was limited to the respective members of the organizations. All candidates could say anything they wished, solicit contributions, and ask participants to volunteer for their campaigns. The FEC conditioned its approval on each organization's paying a pro-rata share of the costs based on the number of its members who participated. In this way, no organization would be subsidizing the costs of candidate appearances to a restricted class other than its own.[47]

d. Reporting Expenditures for Member Communications

A 501(c)(4) must report all direct expenditures made for membership communications that expressly advocate the election or defeat of a clearly identified candidate if the aggregate costs exceed $2,000 per election for all federal candidates in the election. There is one exception to this rule: the costs of communications primarily devoted to subjects other than express advocacy do not have to be reported. (See Example 4 below.)

Quarterly and pre-general election reports (using FEC Form 7, "Report of Communication Costs by Corporations and Membership Organizations") are filed with the FEC during election years. Costs are aggregated for each election; consequently, there is a separate limit for all primary, general, and special elections. The report requires an organization to identify the candidate(s) that the communication benefited or opposed. If a communication identifies more than one candidate, the total costs may be allocated among the candidates based on the space or time devoted to each candidate relative to the overall communication.

Example:

PEN, a 501(c)(4), spends $50,000 to write, publish, and distribute a mailing sent only to its members, urging them to reelect the President and touting his strong environmental record and the promises he has made to continue making progress in his second term. PEN must report the cost of the mailer on FEC Form 7, identifying the dates of the communication, the type of communication, the candidate supported, and the cost of the communication.

Example:

PEN spends $50,000 to write, publish, and distribute a mailing sent only to its members. Half of each mail piece is dedicated to supporting the President's reelection; the other half of each mailer focuses on urging members to vote for the pro-environment candidate in their district. PEN publishes five different versions of this mailer, targeted at five congressional districts. The mailer is allocable between the President and the five congressional candidates. PEN must file FEC Form 7. In doing so PEN should report $25,000 spent to support the President and $5,000 for each of the five congressional candidates.

Example:

PEN has a newsletter that is distributed widely to members and the general public. PEN lists candidates across the country whom PEN endorses as "pro-environment." PEN has ***not*** coordinated with any candidate or candidate's committee in preparing or distributing the newsletter. PEN is permitted to send these communications, and the costs of the newsletter may be allocated between membership communications and independent expenditures.

Example:

PEN publishes a monthly magazine for its members on environmental issues and related topics. The October issue also carries an article about endorsements of candidate for Congress and President. The costs associated with the endorsement article do not have to be reported because the publication is primarily devoted to other topics.

4. Events with Candidates Targeted at the General Public

Even after the Supreme Court's decision in *Citizens United*, corporations are prohibited from engaging in express advocacy of candidates to the general public unless the communication is independent of the candidate, campaign, and political party. Therefore, certain election-related activities targeted toward the general public continue to raise issues because they involve a degree of coordination with candidates, their campaigns, or a political party. Because the FEC has not revised its regulations after *Citizens United*, and as the regulations have not yet been challenged directly, it remains unclear to what extent these rules continue to apply.

a. Candidate Debates

The FEC's regulations provide that a 501(c)(4) may conduct federal candidate debates that are open to the public, but only if the organization does not endorse, support, or oppose any candidate or political party.[48] A corporation or labor union may donate funds to support a debate conducted by the 501(c)(4) organization.

At least two candidates must be included in the scheduled debate.[49] The candidates must meet face to face; they may not be scheduled to speak at separate appearances.[50] If circumstances beyond the organization's control arise, such as bad weather preventing one candidate from showing up, the organization is not required to cancel the debate.[51]

The debate may not be designed or conducted to favor one candidate over another. The sponsoring organization must use pre-established, objective criteria for selecting candidates to participate if there are too many to accommodate at a single debate. Written criteria should be presented to the candidates. The sponsoring organization may not express support for or opposition to or solicit funds for any candidate or political party at, or in conjunction with, the debate.

b. Non-Electoral Appearances by Officeholders

A 501(c)(4) may also sponsor events for the general public at which one or more officeholders appear, even if those appearing are also candidates, as long as the appearance is not campaign-related.[52] The rules on candidate debates do not apply to these events. It must be clear that, although the speakers are candidates for office, they are appearing in their capacity as officeholders (or in some other non-candidate role). The 501(c)(4) should make reasonable efforts to have speakers address issues, not campaign activities or rhetoric. Neither the organization nor the candidate may advocate the election or defeat of any candidate or raise funds for a candidate or party. There is no requirement, in this case, to offer other candidates the opportunity to speak. References to the speaker's campaign or to the campaign or the qualifications of other candidates in the same race could cause the appearance to be considered campaign-related.

5. Use of 501(c)(4) Facilities, Resources, and Staff

A 501(c)(4) may allow a federal candidate, political party, or political committee to use its meeting rooms on the same terms on which they are customarily made available to clubs or to civic or community organizations.[53] In this case, however, the 501(c)(4) is required to make the room available to any other candidate on the same terms. A 501(c)(4) may rent or sell its membership lists to a campaign or political committee at fair market value or may exchange its lists for a list of approximately the same value. The candidate or political committee must pay for the use of these resources *in advance*.

a. Volunteer Activities

Members, staff, and directors of a 501(c)(4) may volunteer to support and work for federal candidates, as long as the work is on their own time and in an individual capacity. However, they may only make "occasional, isolated, or incidental use" of the organization's facilities for these volunteer activities. "Occasional, isolated, or incidental" generally means that the individual's use during working hours does not prevent employees from completing their normal amount of work.[54] Employees may, for example, use office phones to organize members to volunteer for a campaign on an "incidental" basis. The regulations provide a "safe harbor" for activity that does not exceed one hour per week or four hours per month. Thus, individuals are permitted, during or outside working hours, to use corporate or union facilities to work on behalf of a federal candidate whom they support as long as:

- the corporation does not make the availability of the equipment conditional on its use for political activity or in support of or opposition to any particular candidate or political party; and
- the individual reimburses the corporation to the extent that the overhead or operating costs of the corporation are increased. The reimbursement is an in-kind contribution by the volunteer to the candidate who benefits from the volunteer work.[55]

b. Exemption for Use of Computer Equipment

The FEC regulations provide an additional exemption for individual volunteer activity conducted on the Internet using an employer's computer equipment. An individual's activity will be treated as "occasional, isolated, or incidental," even if it is in excess of one hour a week or four hours per month, as long as:

- the employee completes the normal amount of ordinarily expected work;
- the use does not increase the overhead or operating costs of the corporation; and
- the activity is not performed under coercion by the employer.

c. Corporate-Sponsored Activities

The rules for volunteer activities *do not* apply to corporate-sponsored activities, such as those conducted by senior management to further the interests of their employing organization. The rules require that this use of corporate resources must be paid for *in advance* by a Federal PAC, the employees (within their lawful contribution limit), or the campaign of the candidate benefiting from the activity. All advance payments must be at full fair market value.

For Federal PACs that frequently use the facilities or staff of a connected corporation, it is often simpler to have the PAC advance lump sums to the corporation and draw down these funds as necessary. For example, frequently organizations want to send staff to work on specific campaigns for candidates whom they have endorsed. Providing these services is an in-kind contribution to the candidate's campaign. The Federal PAC must make a payment to the corporation that employs the staff in advance for salary, benefits, and any other associated costs. The Federal PAC may advance a lump sum to the corporation, and the corporation may draw from that payment to cover the amount of the salary and benefits that the employees earn. Similarly, if the Federal PAC wants to use a meeting room in the corporate facilities to host a fundraiser for a federal candidate, the PAC must pay fair market value in advance of the event for the use of that room.

Electioneering communications are targeted broadcast ads (TV, radio, cable, and satellite) aired within 30 days of a primary or 60 days of a general election that mentions the name of a federal candidate.

6. Electioneering Communications

a. Basic Rules

Corporations may air certain broadcast communications known as "electioneering communications."[56] Electioneering communications are targeted[57] broadcast ads (TV, radio, cable, and satellite) aired within 30 days of a primary or 60 days of a general election that mentions the name of a federal candidate. Although the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited corporations and unions from using general treasury funds for "electioneering communications," the Supreme Court in *FEC v. Wisconsin Right to Life* ruled that the blackout period was unconstitutional unless an ad had the "functional equivalent" of express advocacy, "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[58] Subsequently, the Court ruled in *Citizens United* that a corporation may engage in electioneering communications including those that are the functional equivalent of express advocacy. Therefore, electioneering communications are no longer restricted in any manner—corporations and unions may engage in electioneering communications—but are subject to reporting requirements.[59]

b. Reporting Electioneering Communications

If the corporation spends an aggregate of $10,000 to produce and air electioneering communications, the group must report those expenditures on FEC Form 9 ("24-Hour

Notice of Disbursements/Obligations for Electioneering Communications") within 24 hours of when the advertisement first airs.[60] Each additional time that the nonprofit aggregates another $10,000 in electioneering communications spending during a calendar year, it must file another report within 24 hours. Unlike the 48-hour reports for independent expenditures (see above), the $10,000 threshold for electioneering communications is triggered by the aggregate of spending on all electioneering communications for all elections and candidates within a calendar year; it is not based on spending for each candidate and election separately.

The group must report the amount of each disbursement or amount obligated of more than $200 to produce or air the ad during the period covered. In addition to reporting the money that it spent on the ads, a corporation whose expenditures trigger 24-hour reporting for electioneering communications is required to report the names and addresses of certain donors. At the time of publication, the requirements for reporting donors to the organization is the subject of ongoing litigation. Currently, an organization must disclose each of its donors who contributed an aggregate of $1,000 or more since January 1 of the preceding calendar year for the purpose of furthering electioneering communication. If the organization instead sets up a separate account to make electioneering communications, it must disclose only the donors *to that account* who contributed more than $1,000 since January 1 of the previous year. Given the uncertainty surrounding this disclosure issue, however, before engaging in electioneering communications it is advisable to check the current status of the FEC's regulations.[61]

7. Disclaimers for Independent Expenditures and Electioneering Communications

All public communications paid for by 501(c)(4) organizations that expressly advocate the election or defeat of a clearly identified federal candidate, as well as all electioneering communications, must carry a disclaimer stating who paid for and authorized the communication.[62] A public communication includes any communication by means of broadcast, cable, or satellite; newspaper or magazine ad; billboard or mass mailing; phone bank to the general public; or other form of general public political advertising. General public political advertising does not include communications over the Internet other than communications placed for a fee (such as pop-up and other types of ads) on another person's website.[63] Some groups choose to include a disclaimer on Internet communications that are independent expenditures, even though this notice is not required unless the communications are paid for by a federal political committee. See Chapter III, § F(3) regarding disclaimers for other entities, PACs, and electioneering communications.

A "membership communication" sent by a membership organization to its members does not require a disclaimer. In addition, there is an exception for communications placed on "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed."[64] Nor are disclaimers required for "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable."

The disclaimers must state the corporation's full name and permanent street address, telephone number, or Web address, and the fact that the communication is not authorized by any candidate or campaign.

Disclaimers must be "clear and conspicuous" in order to give the viewer, listener, or reader adequate notice of the entity paying for and authorizing the communication. The disclaimer must not be difficult to read or hear, or presented in such a way that it could be easily overlooked. In a written communication, it must be contained in a box, printed with

reasonable contrast, and set apart from the rest of the communication. A disclaimer in 12-point font size satisfies the requirement when used in materials (such as signs, posters, and newspapers) that are no larger than two by three feet.

Example:

"Paid for by Protect the Environment Now, www.pen.org [or street address or phone number], and not authorized by any candidate or candidate's committee."

Phone banks. Live caller phone banks to the general public—defined as more than 500 substantially similar phone calls within a 30-day period to individuals other than a group's members[65]—must include a disclaimer. The caller must identify the name of the entity paying for the call and whether or not the call is authorized by a candidate. To be clear and conspicuous, it must be delivered in a manner that is not hard to hear (either because it is not audible or because it is stated too quickly). It is not clear whether a caller needs to state the complete disclaimer at the beginning of the phone call or whether it is acceptable to provide some of the information at the end of the conversation. (See below for special rules governing robocalls.)

Example:

"This call is paid for by Protect the Environment Now and is not authorized by any candidate or candidate's committee. You can learn more about PEN at our website, www.pen.org."

Broadcast communications. In addition to the general disclaimer discussed above, broadcast communications require a disclaimer stating the full name of the corporation responsible for the communication.[66] If the communication is broadcast on the radio, the statement must be spoken clearly. If the communication is transmitted on television, cable, or satellite, the statement must be accompanied by a voiceover stating the information, and the disclaimer must appear in writing at the end of the communication in a clearly readable manner, with a reasonable degree of color contrast to the background; it must be shown for a period of four seconds.

Example:

"Paid for by Protect the Environment Now, www.pen.org [or street address or phone number] and not authorized by any candidate or candidate's committee. PEN is responsible for the content of this advertisement."

8. Special Rules for Robocalls

Although some aspects of federal law governing robocalls do not apply to political calls (e.g., limitations on permissible hours, Do Not Call list, and opt-out policy), *all* robocalls are required by federal law to include the following disclaimers: the call must (1) "at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call," and (2) "during or after the message, state clearly the telephone number or address of such business, individual, or other entity initiating the call."[67] The Federal Communications Commission's regulations implementing this statute do not require specific language to meet these requirements. However, the regulations specify that the telephone

number provided for disclaimer purposes may not be that of the autodialer or prerecorded message player that placed the call.[68]

Many states also have disclaimer requirements for robocalls that go *beyond* those imposed by federal law. Note that in recent years some states have enacted substantive restrictions on robocalls and have even prohibited robocalls altogether. It is therefore important to review both federal and state rules before engaging in this activity.

E. COORDINATION AND INDEPENDENT ACTIVITIES

Expenditures made in concert or cooperation with a candidate or political party are treated as in-kind contributions subject to the prohibitions and limitations of the FECA.[69] Specifically, a 501(c)(4) corporation may not engage in coordinated communications with the general public. FEC regulations set out a three-part test to determine if a particular communication is "coordinated."[70] Satisfaction of *all three* of the specific elements of the test "justifies the conclusion that payments for the coordinated communication are for the purpose of influencing a Federal election." The three elements are payment, content standard, and conduct standard.

A 501(c)(4) corporation may not engage in coordinated communications with the general public.

1. Payment

The communication is paid for, in whole or in part, by someone other than a candidate, a candidate's authorized committee, or the candidate's agents, or a political party or its agents. The definition of "agent" includes any person who has actual authority, express or implied, to engage in specific activities (listed in the rules) on behalf of a principal.[71]

2. Content Standard

In order to limit the rules to communications whose subject matter is reasonably related to an election, the communication must be one of the following:

- a "public communication" that expressly advocates the election or defeat of a clearly identified candidate;
- a communication that satisfies the definition of an electioneering communication as defined by the statute;
- a "public communication" that includes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or any agent of either the candidate or his authorized committee;
- a "public communication" that is the functional equivalent of express advocacy (A communication is considered to be the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate." The FEC has considered the functional equivalent of express advocacy to be broader than express advocacy and looked to the Supreme Court's application of the test in decisions including *FEC v. Wisconsin Right to Life*.);
- a "public communication" that satisfies *each* of the following:
  - » refers to a political party or a clearly identified federal candidate (including a reference made to a candidate through the "popular name" of a bill or law);
  - » is publically distributed within defined time periods: in the case of a political party or presidential candidate, 120 days before a general, special, or runoff election or a primary, convention, or caucus to nominate a candidate; in the case of a U.S. House or Senate candidate, 90 days before the same events; and
  - » is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appears on the ballot.

For each of these types of communications under the content standard, a "public communication" is a "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising." "Public communications" do not cover the Internet and other electronic communications (including email), other than ads placed for a fee on another person's website, private correspondence, or internal communications between a corporation or labor organization and its restricted class.

3. Conduct Standard

The rules enumerate different types of conduct, any of which may satisfy this test, *whether or not there is agreement or formal collaboration*[72]:

Request or suggestion. A communication that is created, produced, or distributed at the request or suggestion of a candidate or authorized committee or political party or agent of any of these entities. This standard also covers the situation where the entity paying for the communication makes the suggestion, and the candidate, authorized committee, or political party committee assents to the suggestion.

Material involvement. A candidate, authorized committee, political party, or agent is materially involved in the decisions regarding the content, intended audience, the means and mode of the communication, specific media outlet used for, timing and frequency, or size and prominence of a printed communication or duration of a broadcast, cable, or satellite communication.

Substantial discussion. A communication is produced, created, or distributed after substantial discussion about the communication between the person paying for the communication (or their employees or agents) and the candidate identified in the communication, his authorized committee, his opponent's authorized committee, a political party, or agents of any of these individuals or entities. The discussion is "substantial" if the information conveyed to the person paying for the communication is material to the creation, production, or distribution of the communication. In addition, this rule does not apply when the "material" information was obtained from a publically available source.

Common vendor. The communication is created or distributed by an organization with the assistance of a vendor who has provided certain types of services to a candidate, her authorized committee, her opponent's committee, a political party, or an agent of any of these entities within the previous 120 days. A candidate and an entity sponsoring a communication could share the same vendor, however, if the vendor does not use material information about the campaign or convey material information about the campaign to the entity. (See the discussion of safe harbors below.)

Former employees. The communication is created and distributed with the assistance of an employee or independent contractor of a candidate, authorized committee, or political party committee within the previous 120 days. The former employee or contractor must use or convey to the entity making the communication information about the identified candidate's (or opponents') plans, projects. or activities, and that information must be material to the creation, production, or distribution of the communication.

4. Safe Harbors

Policy discussions. A candidate's or political party committee's response to an inquiry about a candidate's or party's positions on legislative or policy issues that does not include a discussion of campaign plans, projects, or needs does not satisfy the conduct standards. This provision is intended to permit organizations to make inquiries about a candidate's views on policy issues or legislation in the context, for example, of preparing a voter guide or a lobbying campaign.

Firewall. The regulations expressly provide that, absent other factors, there is no coordination if the commercial vendor, former employee, or organization establishes and implements a "firewall" that prohibits candidate and political party information material to a communication from passing to individuals who are creating, producing, or distributing a communication subject to the coordination rules. The firewall must be described in a written policy that is distributed at the time of implementation to all relevant employees, consultants, and clients who are affected by the policy. If, however, there is specific information that is material to the creation, production, or distribution of the communication used by or conveyed to the person paying for the communication, the firewall will not provide a defense.

F. RULES ON POLITICAL ACTIVITY BY UNINCORPORATED ASSOCIATIONS UNDER THE FECA

Under the FECA, unincorporated associations, including unincorporated 501(c)(4)s, are considered "persons" and are treated as individuals for purposes of contribution limits (with the exception that the $117,000 aggregate two-year limit on contributions by individuals does not apply). If the association's major purpose is campaign-related activity, it must register as a federal political committee, which is subject to all the FECA registration and reporting requirements and limits on contributions and the solicitation of funds.

Some states permit corporations, including nonprofit corporations, to make contributions to state and local candidates and committees.

G. RULES ON POLITICAL ACTIVITY IN STATE AND LOCAL ELECTIONS

A 501(c)(4) seeking to influence nonfederal elections may also be subject to regulation and reporting obligations under state and local law for political activity. Some states permit corporations, including nonprofit corporations, to make contributions to state and local candidates and committees. Following the Supreme Court's ruling in *Citizens United*, corporations are permitted to make independent expenditures in connection with state and local elections. Most states have either enacted laws governing the disclosure of independent expenditures or are in the process of revising their campaign finance disclosure laws. Before conducting any political activities, including raising or spending funds, for the purpose of influencing state or local elections in a particular state, it is advisable to seek the advice of counsel. Note that the Internal Revenue Code limitations on political activity by 501(c)(4)s applies to all federal, state, and local electoral activities, as does the possibility of tax on political activities under IRC section 527.

CHAPTER I ENDNOTES

1 *See* John Francis Reilly et al., Internal Revenue Service, *2003 Exempt Organizations Continuing Professional Education Text*, "IRC 501(c)(4) Organizations" at 452, available at http://www.irs.gov/pub/irs-tege/eotopici03.pdf.

2 *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989); *Democratic Leadership Council v. United States*, 542 F. Supp. 2d 63 (D.D.C. 2008).

3 PLR 201128032 (April 4, 2011).

4 I.R.C. § 6113; see IRS Notice 88-120, 1988-2 C.B. 454.

5 I.R.C. § 162(e)(3).

6 I.R.C. § 6033(e)(1)(A)(ii).

7 I.R.C. § 6033(e)(2).

8 Rev. Proc. 98-19, 1998-1 C.B. 547, § 4.02. This amount is current as of 2012. The dollar amount is indexed for inflation; Rev. Proc. 2010-40 § 3.23 sets the 2011 inflation-adjusted dollar value.

[9] The Senate provides information at http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf (last visited May 2012), and the House provides information at http://clerk.house.gov/pd/guideAct.html (last visited May 2012).

[10] *See* 2 U.S.C. § 1611.

[11] H.R. Rep. 104-339, pt. 1, at 24 (1995).

[12] Treas. Reg. § 1.501(c)(4)-1(a).

[13] Rev. Rul. 81-95, 1981-1 C.B. 332.

[14] In an informal email, an IRS staff member stated, "Primary is more than half—based on all of the facts and circumstances" including volunteer activities. Email correspondence from IRS spokeswoman Nancy Mathis to Public Citizen researcher Taylor Lincoln, August 5, 2004 (obtained from the recipient). This is not a precedential authority.

[15] Raymond Chick and Amy Henchey, Internal Revenue Service, *1995 Exempt Organizations Continuing Professional Education Text*, "Political Organizations and IRC 501(c)(4)" available at http://www.irs.gov/pub/irs-tege/eotopicm95.pdf.

[16] I.R.C. § 527(e). *See also* Rev. Rul. 2004-6, 2004-1 C.B. 328 (discussing factors indicating whether an activity qualifies as a political activity).

[17] For more on these regulations, see *The Rules of the Game: An Election Year Legal Guide for Nonprofit Organizations* (Alliance for Justice, 2010).

[18] Rev. Rul. 2004-6, 2004-1 C.B. 328. These factors are not an exhaustive list; rather, the IRS also may examine other factors based on the situation. This revenue ruling includes six sample scenarios that are likely to be encountered by 501(c) organizations. The IRS applies its analysis as to whether the activities in each scenario are likely to be characterized as political activities ("exempt functions").

[19] *See* Lloyd H. Mayer, "Political Activities of Tax-Exempt Organizations—Useful Guidance in Rev. Rul. 2004-6," 100 *J. Tax'n* 180 (2004).

[20] *See, e.g.,* http://democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-5FBBBA57812%7D/uploads/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf; http://schumer.senate.gov/Newsroom/record.cfm?id=336270.

[21] Rev. Rul. 2004-6, 2004-1 C.B. 328; *see also* Rev. Rul. 2007-41 (which provides examples of the types of activities and communications that will be treated as nonpartisan or political based on facts and circumstances for 501(c)(3) organizations. The examples are equally applicable to 501(c)(4) organizations).

[22] Treas. Reg. § 1.527-6(b)(3).

[23] At issue in the case was the attempt by Citizens United, a 501(c)(4) organization, to make its documentary film *Hillary: The Movie*, already screened in public theaters, available for home consumption through a video-on-demand provider via cable and satellite television technology. Citizens United also wanted to promote the film in television advertisements. Unlike theatrical and Internet distribution, the proposed televising of the film and the ads implicated the electioneering communications provisions of the Bipartisan Campaign Reform Act (BCRA), which prohibit corporate (and union) expenditures for certain broadcast communications that "refer" to a federal candidate and run within 30 days of a primary or 60 days of a general election. The majority found that the film was the "functional equivalent of express advocacy" because there was "no reasonable interpretation" other than that it was an appeal to vote against Hillary Clinton for the office of President. Accordingly, BCRA prohibited the televising of the film.

[24] Prior to the Supreme Court's decision in *Citizens United*, only a "qualified nonprofit corporation" (QNC) was permitted to make independent expenditures and electioneering communications that were the "functional equivalent" of express advocacy using corporate treasury funds. Under the regulations, an incorporated 501(c)(4) that meets the following stringent criteria may be treated as a QNC: (1) it may not engage in any business activities. Business activities include income-producing activities such as the provision of goods or services, advertising, or promotional activity. They do not include fundraising activities for contributions and membership dues; (2) it may not have shareholders or other persons, other than employees or creditors, who are affiliated with the organization in a way that would allow them to make a claim on the organization's assets or earnings or offered or receive any benefit that creates a disincentive for them to disassociate themselves from the corporation; and (3) it may not be established by or accept contributions from any business corporation or labor organization. The 501(c)(4) must be able to show that it has received no direct or indirect donations from these sources as demonstrated by accounting records or, if that is not possible, a written policy against accepting these donations.

This rule for independent expenditures by QNCs was an exception to the general FECA prohibition of the use of corporate funds to influence the election or defeat of a clearly identified candidate. In light of the decision in *Citizens United*, QNC status has little or no significance because all corporations may now conduct independent expenditures.

[25] FEC Statement on the Supreme Court's decision in *Citizens United v. FEC* (February 5, 2010) (available at http://www.fec.gov/press/press2010/20100205Citizens United.shtml).

[26] Notice of Proposed Rulemaking, Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 80803 (Dec. 27, 2011).

[27] In most cases, this guide assumes that 501(c)(4)s have chosen to incorporate rather than exist as unincorporated associations. Although it is possible to become a 501(c)(4) without incorporating, 501(c)(4)s that expect to work with 501(c)(3)s may be better off incorporating, because doing so helps to establish the legal separation between the organizations required by federal tax law. For more information about political activity by unincorporated entities, see Chapter I, § G.

[28] "General treasury funds" (or simply "corporate funds") are funds received from voluntary contributions by members or supporters of a corporation or from revenue-producing activities.

[29] *See* 2 U.S.C. § 441b(a) (2012).

[30] *See* 2 U.S.C. §§ 431(8), (9) (2012).

[31] 11 C.F.R. § 100.26 (2012).

[32] 11 C.F.R. § 100.22(a) (2012).

[33] 11 CFR § 100.22(b) (2012). Note that the second test (so called Part b)—viewing the communication as a whole—was struck down by several courts. However, recent decisions including *The Real Truth about Abortion v FEC*, No. 11-1760 (4th Cir. June 12, 2012), *McConnell v. FEC*, 540 U.S. 93 (2003), *Citizens United*, and others opened up the possibility that express advocacy may be interpreted more broadly to include communications that do not contain the magic words. Since that time, the controversy over this definition of express advocacy has continued. *See, e.g.,* McGann Statement of Reasons, Softer Voices, MUR 5831.

[34] Notice of Proposed Rulemaking, *supra* n. 43, at 80810.

[35] *See* 18 U.S.C. § 597 (2002).

[36] Independent expenditures in support of or opposing Presidential or House candidates are reported to the Federal Election Commission and the Secretary of State for the state in which the candidate is seeking election. Independent expenditures involving Senate candidates are reported to the Secretary of the Senate and the Secretary of State for the state in which the

candidate is seeking election, except in the case of 24-hour and 48-hour reports, which are reported to the FEC and to the Secretary of State for the state in which the candidate is seeking election. *See* 11 C.F.R. § 104.4(e) (2002).

[37] 11 C.F.R. § 109 (2012); FEC Form 5 Instructions, available at http://www.fec.gov/pdf/forms/fecfrm5i.pdf.

[38] 11 C.F.R. § 104.3(b)(3)(vii) (2012).

[39] 11 C.F.R. § 104.4(b)(2) (2012). Expenditures supporting Candidate A and those made to oppose Candidate A's opponent are added together to count toward the threshold. However, expenditures to support a Senate candidate and a House candidate in the same location are not aggregated together to count toward the threshold, nor are expenditures made in a candidate's primary election aggregated with general election expenditures for the same candidate.

[40] 11 C.F.R. § 104.4(c) (2012).

[41] 11 C.F.R. § 104.4(f) (2012).

[42] Under certain limited circumstances, a corporation may also solicit contributions from non-executive or non-administrative employees. Twice per year, a corporation or its SSF may solicit employees who do not qualify as executive and administrative personnel, such as members of labor unions represented in the corporation. *See* 11 C.F.R. § 114.6 (2012).

[43] FEC Advisory Opinion 1984-23. For further analysis of *de minimis*, see also FEC Advisory Opinion 1978-97 (holding that less than three percent is *de minimis*) and FEC Advisory Opinion 1994-21 (outlining the factors that the FEC considers when evaluating whether the communication is received by a *de minimis* number of nonmembers).

[44] 11 C.F.R. § 114.3(c)(2) (2012).

[45] 11 C.F.R. § 114.3(c)(2)(iii) (2012).

[46] 11 C.F.R. § 114.4(b) (2012).

[47] FEC Advisory Opinion 2007-14.

[48] While the regulations continue to indicate that corporations that endorse, support, or oppose candidates may not hold candidate debates, it is unclear whether this regulation is constitutional.

[49] This two-candidate minimum is required by the FEC, not the IRS. *See* 11 C.F.R. § 110.13(b)(1) (2012).

[50] *Cf*. FEC Advisory Opinion 1996-11 (allowing an organization to avoid hosting a candidate's opponent only when the candidate was invited based on his legislative role and when the organization does not engage in express advocacy for the candidate during the appearance).

[51] Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995).

[52] *See* FEC Advisory Opinions 2004-14; 1999-2; 1996-11; 1992-6.

[53] 11 C.F.R. § 114.13 (2012).

[54] 11 C.F.R. § 114.9(a)(1) (2012).

[55] 11 C.F.R. § 114.9(a)(2) (2012).

[56] 11 C.F.R. § 100.29 (2012).

[57] "Targeted" to an electorate means that the broadcast advertisement can be received by more than 50,000 people in the voting district of the candidate identified in the ad (e.g., the state for a Senate candidate, the congressional district for a House candidate, or a state with a presidential primary for a presidential candidate).

[58] *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449 (2007).

[59] *Citizens United*, 558 U.S. _____, 130 S. Ct. 876 (2010).

[60] 11 C.F.R. § 104.20 (2012); 11 C.F.R. § 114.10(e)(1)(ii) (2012) for reporting requirements. *Also see* footnote 78 below regarding donor disclosure.

[61] The district court decision in *Van Hollen v. FEC* was reversed. Therefore, until further developments, organizations must report only those donors who contributed an aggregate of $1,000 or more since January 1 of the preceding calendar year for the purpose of furthering electioneering communications. *See Center for Individual Freedom, et al. v. Christopher Van Hollen and FEC*, No. 12-5117 (September 18, 2012).

[62] 11 C.F.R. § 110.11(a)(2) (2012). Note that, while a corporation must run a disclaimer only on electioneering communications and "public communications" that expressly advocate the election or defeat of a clearly identified candidate, PACs are required to provide disclaimers on public communications as well as electronic mail of more than 500 substantially similar communications and all websites available to the general public.

[63] 11 C.F.R. § 100.26 (2012).

[64] 11 C.F.R. § 110.11(f)(1)(i) (the "small items exception"); 11 CFR 110.11(f)(1)(ii) (the "impracticable exception"). *See also* Advisory Opinions 2002–09 (Target Wireless) and 2010-19 (Google).

[65] 11 C.F.R. § 100.28 (2012).

[66] 11 C.F.R. § 110.11(c)(4) (2012).

[67] 47 U.S.C. § 227(d)(3)(A) (2012).

[68] 47 C.F.R. § 64.1200(b)(2). Note, also, that the regulations do not mention providing a caller's address. According to the regulations, only the caller's phone number is sufficient for the disclaimer, despite the clear statutory language that an address satisfies the legal requirement. *Compare* 47 U.S.C. § 227(d)(3)(A)(ii) ("during or after the message, state clearly the telephone number or address of such business") with 47 C.F.R. § 64.1200(b)(2) ("during or after the message state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business").

[69] BCRA provides that the FEC's regulations "shall not require agreement or formal collaboration to establish coordination" and that the FEC must address in its rulemaking (though not necessarily promulgate rules on) four issues: (1) payments for the republication of campaign materials, (2) payments for the use of a common vendor, (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party, and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, § 214(c), 116 Stat. 95 (2002).

[70] 11 C.F.R. § 109.21 (2012).

[71] 11 C.F.R § 109.3 (2012).

[72] 11 C.F.R. § 109.21(d) (2012).

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