

advocacy resource

THE RULES OF THE GAME

A Guide to Election-Related Activities
for 501(c)(3) Organizations

Second Edition



ALLIANCE^{FOR}JUSTICE

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SECOND EDITION—CONTRIBUTING EDITORS

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PREFACE

Election years provide nonprofit organizations with a wonderful opportunity. It is a time when public policy issues are explained and debated in the context of voters deciding which policies and candidates they prefer. When actively campaigning, officeholders are more likely to pay attention to organizations advocating for causes; therefore, nonprofits owe it to their communities to be active during election years. Their constituents depend upon these groups to use this opportunity to focus attention on the issues, programs and policies that affect their lives.

Each election year, Alliance for Justice receives many emails and phone calls asking what nonprofit organizations can and cannot do under tax and election law during an electoral campaign, such as:

By providing legal support to nonprofits to participate in the political process, Alliance for Justice seeks to enhance their participation in public policy debates.

- “Are nonprofit organizations completely prohibited from any involvement in candidate campaigns?”
- “Is there a minimal amount of electoral activity that we can do without risking our tax-exempt status?”
- “How does the IRS define political activity?”
- “Does federal election law apply to 501(c)(3) organizations?”
- “How does the Federal Election Commission (FEC) define political activity?”

This guide—*The Rules of the Game: A Guide to Election-Related Activities for 501(c)(3) Organizations*—seeks to respond to **the most frequently asked questions**. The guide is a tool to enable 501(c)(3) public charities to participate as fully in the electoral process as the law permits.

The guide briefly explains basic federal tax and election law, reviews the right (and wrong) ways to organize specific voter engagement activities—from candidate questionnaires to training programs—and provides information on how these aspects of tax and election law are enforced by regulatory agencies. As this guide illustrates, there are many shades of grey in what the law is. Our authors, who specialize in this area of the law, have provided guidance that depicts how the law is interpreted by most tax and election practitioners as well as the FEC and IRS. However, each organization (along with its counsel) must decide what types of activities it wants to conduct.

By providing legal support to nonprofits to participate in the political process, Alliance for Justice seeks to enhance their participation in public policy debates. Although *The Rules of the Game* directly addresses the law on this topic, it is not intended as legal advice. Any tax advice contained in this publication is not intended to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under federal law. A taxpayer may not rely on our advice to avoid penalties. Rather, it is our belief that the guide will provide enough information to enable you to organize nonpartisan voter education efforts and to know when to consult legal counsel.

Alliance for Justice is a national association of close to 100 organizations dedicated to advancing justice and democracy. For 30 years we have been leaders in the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil and women’s rights, children’s, senior citizens’ and other groups. Alliance for Justice is premised on the belief that all Americans have the right to secure justice in the courts and to have our voices heard when government makes decisions that affect our lives.

Alliance for Justice seeks to increase nonprofit involvement in the policymaking process. In addition to publications such as this one, we support nonprofit advocacy through training

workshops and by providing individualized technical assistance. Alliance for Justice also monitors legislative activity related to nonprofit advocacy, provides information to the charitable community, and lobbies to reduce restrictions on nonprofits.

This updated second edition of *The Rules of the Game* was prepared by Rosemary E. Fei and David A. Levitt at the law firm of Adler & Colvin and Laurence E. Gold of the law firm of Lichtman, Trister & Ross, PLLC. In this second edition, Ms. Fei and Mr. Levitt were primarily responsible for the sections on tax law, and Mr. Gold was primarily responsible for the sections on election law.

As always, we welcome your comments, feedback and suggestions for the next edition of this publication.

A handwritten signature in black ink, appearing to read "Nan Aron". The signature is fluid and cursive, with a large initial "N" and "A".

Nan Aron
President, Alliance for Justice

CHAPTER I:

Tax, Election and Other Federal, State and Local Laws Pertaining to Electoral Activities by Nonprofit Organizations

A. INTRODUCTION

The First Amendment guarantees our constitutional rights of political expression and participation. Why, then, do we have so many laws that limit our electoral activities? They are the result of Congress attempting to control and expose the influence of money in politics through campaign finance laws that regulate electoral campaigns and election-influencing activities, and through tax laws that channel partisan activities into particular legal structures by denying or minimizing tax benefits for groups that undertake those activities.

A NOTE ABOUT TERMINOLOGY

Under federal tax law, a 501(c)(3) organization may “not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” 501(c)(3)s can, however, participate in those electoral activities that do not support or oppose candidates for public office (“nonpartisan electoral activities”).

There is no overarching or consistently used shortcut to refer to this prohibition on supporting or opposing candidates for public office. The Internal Revenue Service, for instance, talks about “political campaign activity.” For many people, that phrase is too broad for it may be seen as covering ballot measure activity as well. Others use “electioneering,” “campaign intervention,” “candidate-related political activity,” “partisan political activities,” “partisan activities,” and more.

In this guide, we have decided to use “campaign intervention” to refer to the prohibition against supporting or opposing candidates for public office. We will use this term—along with supporting or opposing candidates for public office—in the federal tax law sections. Unless the text says otherwise, the term “supporting or opposing a candidate” refers to a candidate for public office.

These laws leave our freedoms as individuals acting alone largely unfettered. Restrictions come into play, however, when individuals combine with others, especially in organizations that raise and spend money. Section 501(c)(3) tax-exempt nonprofit organizations are particularly restricted in how they can use their tax-exempt income and tax-deductible contributions in the political sphere.

In election years, Section 501(c)(3) nonprofit organizations often are eager to get involved in voter registration and education but are confused about what activities are legal and proper. *The Rules of the Game* is a tool to help you navigate the terrain of permissible and impermissible activities, as mapped by the Internal Revenue Service (IRS) under the Internal Revenue Code (IRC) and the Federal Election Commission (FEC) under the Federal Election Campaign Act (FECA), so that your organization can be as engaged and effective as possible.

Throughout this guide, the term “federal tax law” means those federal laws, regulations, and rulings under the IRC that pertain to a nonprofit organization’s tax-exempt status. The term “federal election law” means those federal laws, regulations, and rulings under FECA that govern nonprofits’ participation in campaigns for federal office. The more general term “election law” includes federal, state, and local laws relating to the financing and conduct of elections at every level of government.

Unless otherwise specified, this guide describes the law applicable to 501(c)(3) public charities, which, for purposes of this guide, may also be referred to as 501(c)(3)s or charities. Private foundations under Section 501(c)(3) are subject to their own set of tax rules and are not covered in this publication.

Federal tax law explicitly prohibits activity by 501(c)(3) organizations that supports or opposes candidates for public office, but it does recognize the importance of their participation in the democratic process. The law allows charities to engage in a wide variety of nonpartisan election-related activities, such as voter registration and education activities, as well as to work on ballot measure campaigns. Federal election law, for the most part, does not distinguish between 501(c)(3) organizations and other groups on the basis of their tax-exempt status, and its general restrictions on group activity are substantial. Also, even where FECA delineates permissible group conduct, if 501(c)(3) groups undertake some of that conduct they nonetheless may risk losing their tax-exempt status under the IRC. In short, it’s very important to understand the interplay of these two sets of laws.

FECA itself provides that, in the FEC's exercise of its rulemaking authority, the FEC and the IRS "shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent."¹ The IRS is under no such comparable requirement for its rulemaking under the IRC. Given that the two bodies of law have unrelated objectives, not surprisingly that aspiration has not been achieved, and the two sets of laws only very imperfectly complement each other. Each agency occasionally takes the other's law into account in prescribing its own rules or interpreting its own statute,² but on significant questions, such as the practical distinction between partisan and nonpartisan—or, election-influencing and non-election-influencing—activity, where alignment of the two laws would be especially helpful, one cannot rely upon one agency's standard in dealing with the other's. Election law may permit what tax law prohibits and vice versa, creating a trap for the unwary.

The standards and rules applicable to political activity under the IRC have proven relatively stable over the past few decades, although until recently they have been largely derived from non-precedential "private letter rulings"³ issued by the IRS in response to taxpayer inquiries about the application of the IRC to their current or intended conduct. The IRS has not revised its political activity regulations since 1980, and until 2004 it had no formal process to entertain and resolve complaints alleging a violation of tax-exempt status due to partisan involvement. In 2004, the IRS initiated a process, although still informal, to address in real time allegations of partisanship by 501(c)(3) organizations during the time period around national elections, through targeted examinations, rather than just through the process of auditing returns. This process, now known as the Political Activity Compliance Initiative, or PACI, is described further in Chapter VI. Also after a long hiatus, the IRS has issued precedential "revenue rulings" in recent years addressing the contours of what constitutes partisan election intervention.⁴ More may be forthcoming.

In contrast, the law under FECA has proven to be dynamic and unstable, and its meaning and scope are regularly contested before the FEC and the courts. Most recently, on January 21, 2010, the Supreme Court issued a decision, *Citizens United v. Federal Election Commission*⁵ (*Citizens United*), that markedly altered the campaign finance legal landscape. Congress enacted substantial amendments of FECA with the Bipartisan Campaign Reform Act (BCRA)—the "McCain-Feingold Law"—in 2002, and the FEC makes important revisions to its regulations year in and year out. The FEC's regulations implementing BCRA have been under continuous litigation since its enactment, resulting in several further revisions on major issues. In the wake of *Citizens United*, expect continued changes to the law by the courts, Congress and the FEC.

The FEC produces an average of 30 advisory opinions every year responding to inquiries about the requester's planned activities; these provide a "safe harbor" for the requester and anyone else who acts in a closely similar manner, and they reflect the FEC's interpretation of the law, to which courts accord some deference. The FEC only infrequently directly "supersedes" (rejects) a prior advisory opinion in the absence of a statutory or regulatory amendment. The FEC further elaborates on the law through its ongoing dispositions of enforcement cases that it investigates and resolves administratively. Key documents in these cases become publicly available when the cases conclude.

Accordingly, *The Rules of the Game* must be read in light of continuing legal developments. AFJ will endeavor to post updates to our website (www.afj.org) and send email updates to AFJ members and other members of our Nonprofit Advocacy Network. *The Rules of the Game* itself does not constitute legal advice, and we urge you to consult with counsel experienced in tax and election law before embarking on election-related activities. Any tax advice contained in this publication is not intended to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under federal tax law. A taxpayer may not rely on our advice to avoid penalties. You should consult your attorney if you want a formal tax opinion that conforms to IRS standards to avoid penalties. We believe, however,

Election law may permit what tax law prohibits and vice versa...

that *The Rules of the Game* will answer many of your questions, allay your fears and, most important, inspire and encourage you to get involved in the wide range of electoral activities that are allowed under the law.

B. THE SCOPE OF PERMITTED ELECTORAL ACTIVITIES DEPENDS ON THE ORGANIZATION'S CATEGORY OF TAX EXEMPTION

1. Federal Tax Law

If you are a tax-exempt organization, the IRC and the IRS regulations and rulings dictate how much campaign intervention activity (our shorthand for activities that violate the IRS rules for 501(c)(3) organizations on supporting or opposing candidates for public office) your group can conduct. Section 501(c)(3) explicitly provides federal tax exemption to a charitable organization so long as it “does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁶ The prohibition focuses on activities for or against **candidates for public office only**. If your organization wants to get involved in nonpartisan electoral activity in any way, it is important to learn the IRS rules. These rules apply to all of your organization’s nonpartisan electoral activities—federal, state and local.

The IRS regulates nonprofits’ campaign intervention in four ways:

- Certain types of organizations are absolutely forbidden to support or oppose candidates for public office;
- Other types of organizations are limited in the amount of campaign intervention they can conduct;
- Individuals who earmark their support to politically active organizations for lobbying or campaign intervention may not receive a full, or any, tax deduction for their dues or donations (unlike contributions to 501(c)(3) organizations for their educational or charitable activities); and
- Nonprofit groups engaged in certain campaign intervention activities may have to pay tax on income that would otherwise be tax-exempt.

Congress has decided that nonprofit organizations that want the governmental “subsidy” provided by 501(c)(3) tax exempt status and tax-deductible contributions must in return agree to restrict their campaign intervention activities.⁷ The federal tax rules on campaign intervention activity for 501(c)(3) organizations are based on “withdrawing the public subsidy” from activities that are otherwise perfectly legal.

In general, the larger the subsidy organizations receive due to their tax-exempt status, the less they can do to influence the election of political candidates.

- Charitable organizations, tax-exempt under IRC Section 501(c)(3), pay no tax on their year-end net income, and donations to them are tax-deductible. As noted, 501(c)(3)s are absolutely prohibited from supporting or opposing candidates for public office or political parties.
- Social welfare organizations, exempt under IRC Section 501(c)(4), enjoy only the first tax benefit: they are exempt from income tax, but contributions are not tax-deductible.⁸ A 501(c)(4) may support or oppose candidates, but only as long as that activity remains secondary to its primary, non-candidate work. Under some circumstances, a 501(c)(4) may have to pay a tax on its campaign intervention. This same tax treatment applies to labor and agricultural organizations exempt under Section 501(c)(5), trade associations and business leagues exempt under Section 501(c)(6), and other 501(c) groups other than 501(c)(3)s.

If your organization wants to get involved in nonpartisan electoral activity in any way, it is important to learn the IRS rules.

| Type | IRC Section | Federal Tax Treatment | Campaign Intervention Activities |
|--|-------------|---|--|
| Religious, educational, scientific and other charities | 501(c)(3) | No tax on operating income No investment tax Contributions are tax deductible No business proxy tax on political expenses | Absolutely prohibited (may be subject to tax on any political expenditures made) |
| Social welfare organizations | 501(c)(4) | No tax on operating income No investment tax, so long as political expenses are paid via segregated fund Contributions are not tax deductible Business proxy tax may apply to political expenses | Must be secondary to primary social welfare activities |
| Labor and agricultural organizations | 501(c)(5) | Same as 501(c)(4), except that business proxy tax does not apply to labor groups | Must be secondary to primary labor or agricultural activities |
| Trade associations, professional organizations | 501(c)(6) | Same as 501(c)(4) | Must be secondary to primary common business interest activities |
| Political organizations | 527 | No tax on operating income (may be subject to tax on non-exempt function income) Contributions are not tax deductible Investment income is taxed No business proxy tax on political expenses | Must be substantially only purpose Other activities must be insubstantial |

- Political organizations exempt under IRC Section 527—including many political committees registered with the FEC and state political action committees registered with the appropriate state agency—pay no tax on operating income, but are taxed on their net investment income and all forms of unrelated business income. Donations to 527 organizations are not tax-deductible. Influencing the selection of candidates for public office must be substantially all of the activity of a Section 527 organization.

Over 30 different categories of tax-exempt entities exist under the Internal Revenue Code. For simplicity, these organizations are often referred to as “nonprofits.” They are mainly numbered 501(c)(1) through 501(c)(25), but also include hospital service cooperatives under IRC Section 501(e), farmers’ cooperatives under IRC Section 521, political organizations under IRC Section 527, and homeowners’ associations under IRC Section 528. Income of state and local governmental entities is exempt under IRC Section 115. Most categories can conduct some level of campaign intervention activity without endangering tax-exemption.

The above table shows the relationship, under federal tax law, between tax benefits and levels of allowable campaign intervention activity for the four most common types of 501(c) organizations and for Section 527 political organizations.⁹

2. State Tax Law

Most federally tax-exempt organizations have a parallel tax exemption under state law. Be aware that you need to check for differences between the federal tax law and your state’s tax law. For instance, California and the federal government both tax the investment income of political groups, but the state does not tax the investment income of other organizations that make political expenditures.¹⁰

C. DIFFERENT ACTIVITIES TRIGGER VARIOUS ELECTION LAW REQUIREMENTS

1. Federal Election Law

If your organization wishes to participate in a federal election, the second set of rules you need to know is contained in FECA and the regulations, advisory opinions, policy statements, and enforcement decisions issued by the FEC, as well as court opinions interpreting them. FECA aims to restrict the political influence of money (often in even trivial amounts, especially when spent by corporations or unions) and to expose all such influence to public scrutiny. FECA favors a system in which the money spent in federal elections is either voluntarily contributed by individuals and fully disclosed, or spent by groups and substantially disclosed. Also, some group interactions with candidates and political parties—even simply utilizing common vendors or hiring their previous independent contractors and employees—can convert a group’s public communications into “in-kind” contributions to the candidate or party, triggering various prohibitions, limits, and disclosures.

FECA primarily does not distinguish between for-profit and nonprofit organizations, or different categories of tax-exempt organizations.

Under FECA:

- Corporations, both for-profit and nonprofit, and labor unions are more tightly restricted than are unincorporated associations.
- While some organizations are not allowed to conduct certain electoral activities directly, they are allowed to form separate “political committees” (often referred to as “political action committees,” or PACs) that may legally conduct them.
- Contributions to candidates are more tightly restricted than is spending to influence an election that is undertaken independently of any particular candidate or political party.
- A significant amount of public reporting and disclosure of the sources and amounts of contributions and expenditures is required.
- Broadcast advertisements that mention or include the likeness of a federal candidate are regulated by disclosure and “disclaimer” rules if they are aired close to primaries, caucuses, conventions or general elections (these are called “electioneering communications”).
- The only non-broadcast communications by a tax-exempt entity other than a PAC that are regulated (also by disclosure and disclaimer rules) are those that expressly advocate the election or defeat of a clearly identified federal candidate (“express advocacy”), but the scope of that concept is regularly disputed.

Unlike federal tax law, FECA primarily does not distinguish between for-profit and nonprofit organizations, or different categories of tax-exempt organizations. Instead, it ordinarily distinguishes between incorporated and unincorporated groups, and between groups with and without members, to determine the kinds of political activities it permits. FECA also treats labor unions, which are usually unincorporated, in much the same manner as it does incorporated groups; material in this guide about corporations generally applies in the same manner to unions. Since FECA treats virtually all corporations the same, FECA prohibits both nonprofit and for-profit corporations from getting involved in federal campaigns in much the same manner.

Nonprofit groups **except** 501(c)(3)s (due to IRC prohibitions) may avoid FECA’s restrictions on making contributions to and coordinated communications with candidates by creating and controlling federal PACs that are financed by those groups. Likewise, the officers, employees and supporters of any 501(c) group—including a 501(c)(3)—using **only** their personal resources and other non-501(c)(3) resources, may create an independent (“non-connected”) federal PAC that then may solicit other individuals or PACs for contributions and

engage in campaign intervention. 501(c)(3) organizations cannot directly create or control a political committee, and must avoid the appearance of doing so. See Chapter V, Section H.

2. State and Local Election Laws

Some federal election law rules apply directly to state and local elections, particularly with respect to state and local political parties and political activity by foreign nationals. Every state, however, maintains its own campaign finance law that governs the financing of state and local electoral activity, as well as the time, manner, voter eligibility, and other mechanics of all elections conducted within its borders. State campaign finance laws sometimes mimic and sometimes differ dramatically from the FECA rules for federal elections. Cities and counties sometimes have additional rules. Also, many state and local laws often treat ballot measure activity as electoral whereas federal tax law treats it as lobbying. Discussion of particular state and local laws is beyond the scope of this guide, but nonprofits are well advised to consult legal counsel about them and their interaction with FECA and the IRC.

D. OTHER PERTINENT LAWS

Nonprofit groups also may have to comply with other pertinent legal requirements. For example, if you use radio or television advertising, Federal Communications Commission (FCC) rules govern sponsor identification and equal time. If you receive federal grants or have federally funded workers on staff, federal Office of Management and Budget (OMB) rules forbid the use of those federal resources in election campaigns. State or local government grants often come with similar restrictions. Organizations should also be aware of federal and state lobbying and ethics rules (including gift and travel rules) that may affect their relationship with elected officials or their staff. These laws are beyond the scope of this guide.

CHAPTER II:

The 501(c)(3) Lobbying Limits and Ballot Measures

A. INTRODUCTION

Elections are not held to elect candidates only. Increasingly, voters are shaping state and local laws through ballot measures. While ballot measures, such as bond measures, ballot initiatives, constitutional amendments, and referenda, are voted on at the ballot box, federal tax law treats them as legislation. Therefore, it is lobbying limits that apply, not the electioneering prohibition. If you are interested in working on ballot measures, you need to know the IRS rules on lobbying and consult your state's lobbying laws.¹¹

The IRS definition of lobbying refers to “specific legislation” only. Section 501(c)(3) organizations have unlimited freedom, for charitable purposes, to advocate for changes in public policy by influencing non-legislative decisions of government agencies, executives and courts, and by commenting on social, economic and other issues. The IRS lobbying rules limit the ability to advocate for the passage or defeat of specific legislation only.

This publication concerns election-related activities of 501(c)(3) organizations, and not the lobbying limits imposed on them. Other Alliance for Justice publications are devoted to the lobbying rules. *Being a Player* and *Worry-Free Lobbying for Nonprofits* describe the lobbying rules in more detail. See Alliance for Justice's website, www.afj.org, for all relevant publications and fact sheets. This section is not intended to explain those rules, but only to remind readers of their existence and highlight how the lobbying rules may be relevant in the election context.

B. SECTION 501(c)(3) ORGANIZATIONS MAY LOBBY ON LEGISLATION EITHER TO AN “INSUBSTANTIAL” DEGREE OR, UNDER SECTION 501(h), UP TO A CERTAIN PERCENTAGE OF EXPENDITURES

Section 501(c)(3) defines a tax-exempt charitable organization as one that devotes “no substantial part of [its] . . . activities [to] carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection(h)).” In other words, you may lobby as long as it is an insubstantial part of your overall activities. The term “substantial” has not been defined.

In 1976, Congress enacted IRC Section 501(h) to provide an alternative method for measuring a public charity's¹² lobbying activity that is more clear, predictable, and generous than the “insubstantiality” standard. The great advantage of 501(h) is that only **expenditures** for or against specific legislation count as lobbying. A group that elects to measure its lobbying under section 501(h) can safely spend on lobbying as much as 20 percent of its annual budget, in some cases. Organizations use a formula to determine the percentage of their expenditures that can be spent on lobbying; as an organization's expenditures increase, the percentage that can be spent on lobbying decreases.¹³ Under no circumstances, however, can an organization that measures its lobbying under section 501(h) spend more than \$1 million dollars a year on lobbying. Certain IRS exceptions allow organizations to influence legislation without having to count their expenses as lobbying expenditures.¹⁴

To take advantage of this alternative, you must file Form 5768, a one-page form, to notify the IRS that your organization is “electing” to use the expenditure test under 501(h).¹⁵

Note that private foundations are not permitted to make the 501(h) election and are taxed on any lobbying expenditures they make. Churches may lobby at the insubstantial level, but are not eligible for the 501(h) election.

If you are interested in working on ballot measures, you need to know the IRS rules on lobbying and consult your state's lobbying laws.

C. PUBLIC CHARITIES MAY “LOBBY” VOTERS ON BALLOT MEASURES, BUT THEY MUST AVOID SUPPORTING OR OPPOSING CANDIDATES

The 501(c)(3) prohibition on campaign intervention focuses only on activities for or against **candidates for public office**. Since initiatives, referenda, state constitutional amendments, city charter amendments, bond measures and declarations of policy involve passing laws, not selecting or removing public officials,¹⁶ 501(c)(3)s may participate in these ballot measure campaigns without violating the candidate campaign intervention prohibition.¹⁷

In general, ballot measures are legislative proposals submitted for approval by voters. A charity’s work to support or oppose a ballot measure is actually a lobbying effort directed at voters, who can enact or reject the proposed law. Since voters are acting as legislators in determining whether the measure passes or fails, the IRS considers ballot measure campaigns a form of **direct** lobbying. This is important because 501(h) allows a 501(c)(3) to spend all of its overall lobbying limit on direct lobbying, whereas it may spend only up to a quarter of its overall limit on grassroots lobbying.¹⁸

Public charities that cannot or do not make the 501(h) election remain under the “insubstantial” limitation on ballot measures and other kinds of lobbying activity. These organizations typically should keep their ballot measure expenditures and volunteer time (together with any other lobbying work) under five percent of their overall activities.¹⁹

As described in more detail in Chapter V, Section I, charities must avoid supporting or opposing candidates while supporting or opposing the ballot measures themselves.

Ballot measure activities frequently subject activists, including charities, to registration and reporting rules at the state or local level. These are beyond the scope of this guide, but charities planning work on ballot measures must make themselves aware of these laws and plan to comply with them in advance.

Ballot measure activities frequently subject activists, including charities, to registration and reporting rules at the state or local level.

CHAPTER III:

The 501(c)(3) Prohibition Against Supporting or Opposing Candidates for Public Office Under the Internal Revenue Code

Since 1954, the IRS has interpreted the 501(c)(3) campaign intervention prohibition very broadly and, for the most part, Congress and the courts have not disagreed. The IRS prohibits many activities that are not even regulated under FECA.

A. INTRODUCTION

Section 501(c)(3) of the IRC provides federal tax exemption to a charitable organization so long as it “does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” For convenience, this guide sometimes refers to such activity as “campaign intervention,” although that term is not found in tax law.

In 1954, then-Senator Lyndon Johnson introduced this clause as an amendment to IRC Section 501(c)(3), reportedly because he believed a tax-exempt foundation had supported his opponent in a Texas election, and he wanted to make sure this would not happen again.²⁰

The IRS uses a “facts and circumstances” test to decide whether a 501(c)(3) organization has supported or opposed a candidate for public office. **There is no comprehensive statutory or regulatory guidance on what counts as campaign intervention** or how to conduct particular activities in a permissible (or nonpartisan) manner. Instead, over the years, the IRS has issued a string of rulings and pronouncements addressing specific factual situations, many of which are described in this guide.

Since 1954, the IRS has interpreted the 501(c)(3) campaign intervention prohibition very broadly and, for the most part, Congress and the courts have not disagreed.

B. THE TERMS “CANDIDATE” AND “PUBLIC OFFICE” ARE MORE BROADLY DEFINED UNDER THE IRC THAN UNDER FECA

The IRS prohibits many activities that are not even regulated under FECA. For example, IRS regulations under 501(c)(3) define a “candidate” as any individual who offers himself or herself, **or is proposed by others**, as a contestant for an elective public office.²¹

Clearly, a 501(c)(3) organization cannot support or oppose a declared candidate. However, the prohibition reaches beyond that to include:

- third-party movements,
- efforts to “draft” someone to run, and
- exploratory advance work.

501(c)(3)s could not help in a campaign to draft Al Gore or Condoleezza Rice in 2008 to enter the race for president. While Ross Perot kept entering and withdrawing from the presidential campaign of 1992, the IRS never stopped considering Perot as a candidate.

The IRS also forbids 501(c)(3) organizations from trying to prevent a public official from being re-nominated or re-elected, such as the “Dump Johnson” movement of the late 1960s.²² Similarly, efforts in 2004 to discourage Ralph Nader, who was widely recognized as a potential candidate, from running for president also would qualify as prohibited campaign intervention.

The IRS definition of “public office” covers any position filled by a vote of the people at the federal, state or local level, ranging from the president of the United States to the local school board and elective party offices, such as precinct committee persons²³ and party nominations.

The public office need not be “partisan.” The IRS revoked the tax-exempt status of the Association of the Bar of the City of New York, a 501(c)(3) organization, when the association attempted to rate candidates in elective judicial races on a nonpartisan basis. On appeal, the courts upheld the IRS.²⁴

In contrast, 501(c)(3) public charities are legally allowed to influence the appointment and confirmation of **appointed** public officials, such as judicial and executive branch nominees. Under federal tax law, legislative confirmation of such appointments is treated like influencing any other legislative vote through lobbying.²⁵ Therefore, attempts by an organization to encourage the U.S. Senate to confirm a Supreme Court nominee would count as lobbying.

However, under a bizarre quirk in the Internal Revenue Code, expenditures to lobby on judicial and executive branch nominations may be subject to tax as “political” expenditures.²⁶ The tax is on the lesser amount of the organization’s investment income or “political” expenditures, so the tax applies only to organizations that generate investment income (because, if there is no such income, then **zero** is the “lesser” amount that is subject to tax). A non-501(c)(3) organization could create a separate segregated fund (SSF) to conduct these “political” activities and avoid this adverse tax consequence. But, while the imposition of this tax for nominations activity is a possibility, the IRS has informally indicated that it would not enforce that tax until after giving notice of its intent to do so. Currently, many 501(c)(3) organizations conduct lobbying on nominations out of their general funds rather than through a SSF.

The comparable FEC definitions are much narrower, reflecting FECA’s almost exclusive focus on federal elections. Individuals seeking election to federal office become “candidates” for FECA purposes when they or their agents either raise contributions or make expenditures (as those terms are defined) exceeding \$5,000.²⁷ The FEC does **not** consider an individual to be a candidate when he or she is raising and spending funds solely to “explore” a possible candidacy, and does so in amounts of funds and for periods of time that are reasonably related to doing so (also known as “testing the waters”).²⁸ But if the individual later decides to run for an office, all of FECA’s requirements apply retroactively from the outset of the “exploratory” effort.

Public offices for FECA purposes are limited to federal office, namely president, vice president, U.S. senator, U.S. representative, delegates from the District of Columbia, Guam and the U.S. Virgin Islands, and resident commissioner for Puerto Rico.²⁹

C. BEING NONPARTISAN MEANS MORE THAN AVOIDING “EXPRESS ADVOCACY”

While 501(c)(3) organizations must act in a nonpartisan manner, the definition of “nonpartisan” is not completely clear under IRS guidance however. We do know that nonpartisan means much more than merely avoiding “express advocacy” (that is, explicit “vote for”—and “defeat”—type messages, discussed in Chapter IV, Section B) under federal election law. **One useful working definition is that an activity is nonpartisan if it does not tend to help or hurt the chances for election of any particular candidate or group of candidates, regardless of political party affiliation.** For instance, a 501(c)(3) organization could not campaign to get specific women or Latinos elected, even if they do not care whether the candidates are Republican, Democrat, or non-partisan.

Certain activities, such as publishing voting guides or registering African-American voters, could have the effect, if not the objective, of helping or hurting a specific candidate, yet the IRS has indicated that they can be conducted in a nonpartisan manner in spite of such effects. In situations outside the working definition of what is partisan, proceed with caution, doing what you can to demonstrate that you have no purpose to influence candidate electoral outcomes.

Under a bizarre quirk in the Internal Revenue Code, expenditures to lobby on judicial and executive branch nominations may be subject to tax as “political” expenditures.

The IRS has discretion in enforcing the prohibition as to whether to revoke tax-exemption entirely (with or without assessing the section 4955 tax) just assess the tax, or let the organization off with a warning for minor or inadvertent mistakes.

D. IF A 501(c)(3) VIOLATES THE PROHIBITION ON CAMPAIGN INTERVENTION, IT COULD JEOPARDIZE ITS TAX-EXEMPT STATUS

If a 501(c)(3) engages in prohibited campaign intervention, the IRS may retroactively revoke its tax-exempt status, either for the years during which the violations occurred or permanently. If the revocation is permanent, the organization cannot convert to 501(c)(4) status.³⁰ For each year that exempt status is revoked, it is treated as if it were operating a taxable business. Since political expenditures may not be deductible as business expenses, the group could end up paying tax on a large part of its income. Furthermore, donors' charitable deductions for gifts to the organization during revoked periods could be at risk.

IRS audits of exempt organizations are performed randomly, but they are also done when the IRS becomes aware, through its own monitoring of the media or through complaints from the public, that an organization may be violating the campaign intervention prohibition. In 2004, the IRS initiated a process specifically to address allegations of partisanship by 501(c)(3) organizations through targeted examinations, rather than just through the process of auditing returns. This process is now known as the Political Activity Compliance Initiative, or PACI. For information on enforcement efforts, see Chapter VI on Enforcement.

E. THE IRS CAN IMPOSE A TAX ON A 501(c)(3) THAT MAKES CANDIDATE CAMPAIGN INTERVENTION EXPENDITURES AND ON ITS MANAGERS PERSONALLY

Congress has also provided the IRS another method to enforce the prohibition on supporting or opposing candidates: an intermediate penalty less drastic than revoking a group's tax exemption. IRC Section 4955 imposes:

- a 10 percent tax on political expenditures of 501(c)(3) groups, and
- a tax of 2½ percent of political expenditures on 501(c)(3) managers who approve such expenditures.

Under IRS regulations that interpret Section 4955, nonprofit managers can be protected from the personal 2½ percent tax if they obtain and rely upon a written, reasoned opinion of legal counsel supporting the organization's right to conduct a particular activity.

F. SINCE THE PROHIBITION AGAINST SUPPORTING OR OPPOSING CANDIDATES IS ABSOLUTE, NO SAFE LEVEL EXISTS FOR "DE MINIMIS" VIOLATIONS

The prohibition on supporting or opposing candidates for public office is stricter than the lobbying limitation: even a *de minimus* (minimal) amount of campaign intervention violates IRC Section 501(c)(3). The IRS has discretion in enforcing the prohibition as to whether to revoke tax-exemption entirely (with or without assessing the section 4955 tax), just assess the tax, or let the organization off with a warning for minor or inadvertent mistakes.

G. THE IRS LOOKS AT ALL OF THE FACTS AND CIRCUMSTANCES TO DETERMINE IF A 501(c)(3) HAS SUPPORTED OR OPPOSED A CANDIDATE FOR PUBLIC OFFICE

The IRS does not just look at a 501(c)(3)'s communications to determine if it has intervened in a candidate election. It will look at all external factors as well, including the timing of the communication, the targeted audience, how the messages related to candidates' and political parties' communications, and any other factors the IRS finds relevant in a particular case.³¹ IRS guidance suggests that messages that include distorted facts, disparaging treatment or language, or are otherwise not aimed at developing an audience's understanding of an issue, are all factors that indicate a 501(c)(3) has crossed the line from an educational activity to impermissible campaign intervention.³²

H. RELIGIOUS ORGANIZATIONS ARE GOVERNED BY THE SAME FEDERAL TAX STANDARDS AS OTHER 501(c)(3) GROUPS

The 501(c)(3) prohibition against supporting or opposing candidates applies equally to religious and non-religious charities. While IRS enforcement against churches (and other houses of worship) is subject to a number of procedural requirements intended to protect a church's unique First Amendment rights, the IRS has nevertheless focused its attention on churches and religious organizations as part of its Political Activity Compliance Initiative, described in Chapter VI of this guide. Following the 2004 elections, the IRS reportedly audited 47 churches out of a total of 110 organizations; in 2006 there were 44 audits of churches out of a total of 100 organizations audited in PACI.

One significant IRS action against a church involved the Branch Ministries at the Church at Pierce Creek in Vestal, New York. In 1992, the church paid for newspaper advertisements that criticized then-Governor Bill Clinton from a fundamentalist religious perspective as a "sinner." The ads concluded with the question, "How then can we vote for Bill Clinton?"

The IRS audited the group and revoked its exempt status. The church filed a lawsuit in federal court to reclaim its exempt status. First, it argued that the IRS cannot interfere with the church's constitutionally protected religious freedom. Second, it claimed that the IRS is required under the Religious Freedom Restoration Act of 1993 to use a less severe method of law enforcement with religious organizations. The court upheld the revocation.³³

More recently, the IRS closed an investigation of All Saints' Episcopal Church in Pasadena, California, triggered by a sermon delivered by a guest preacher the Sunday before the 2004 presidential election. In his sermon, entitled "If Jesus Debated Senator Kerry and President Bush," the preacher imagined Jesus participating in a political debate with the two candidates. The preacher strongly criticized President Bush for his administration's actions in Iraq as well as his economic and social policies. He also described these issues as central to the presidential election and asked the congregation to "vote [their] deepest values" when going to the voting booth. Although the IRS determined that this sermon constituted impermissible campaign intervention, it declined to take any disciplinary action against the church.³⁴

The IRS periodically releases a guide specifically detailing the rules for churches, Tax Guide for Churches and Religious Organizations.³⁵

Following the 2004 elections, the IRS reportedly audited 47 churches out of a total of 110 organizations; in 2006 there were 44 audits of churches out of a total of 100 organizations audited in PACI.

CHAPTER IV:

The Federal Election Campaign Act

A. INTRODUCTION

This guide went to print shortly after the Supreme Court decision in *Citizens United v. FEC*. While it is clear that business and nonprofit corporations and unions may make independent expenditures out of their general treasuries, much remains uncertain. Many FEC regulations need to be changed to reflect the Court's decision, and currently pending and expected new litigation may continue to shift the rules.

Organizations still need to determine whether their intended activity constitutes a contribution, coordination, electioneering communication or express advocacy. If it is a contribution or coordination, such activity is still prohibited with general treasury funds (and likewise prohibited to 501(c)(3)s under federal tax law). If an activity is an electioneering communication or express advocacy, disclaimer and disclosure rules apply.

Under the Federal Election Campaign Act (FECA):

- Any group of persons that both (a) raises or spends over \$1,000 per year to influence federal elections, and (b) has as its major purpose influencing federal elections, must register and file financial reports with the Federal Election Commission (FEC) as a federal PAC, and must maintain certain financial records;
- Special funding restrictions and disclosure rules apply to “contributions” and communications that are “coordinated” with a federal candidate or political party;
- Contributions made by one person in the name of another, a practice sometimes referred to as “laundering” or using a “conduit,” are prohibited. For example, this rule prevents employers from reimbursing their employees for political contributions by giving them bonuses or expense accounts; and
- Foreign nationals are prohibited from contributing to any election campaign for public office, whether federal, state or local.

Several FEC rules uniquely affect corporations—including nonprofit corporations—and membership organizations. All of these rules are of interest to 501(c)(4) and other non-501(c)(3) nonprofit organizations that permissibly may engage in partisan activity under federal tax law, and several are important to 501(c)(3)s as well because they restrict even what the tax code otherwise permits them to do.

The FEC rules pertinent to 501(c)(3)s especially involve several key concepts:

- express advocacy
- independent expenditures
- electioneering communications
- contributions
- coordination

B. EXPRESS ADVOCACY

The FEC uses the standard of “express advocacy” for two principal purposes: 1) to define the class of communications that count as “expenditures” (under FECA, a key characteristic of a federal PAC is spending at least \$1,000.01 on expenditures);³⁶ and 2) to define the principal class of independent communications that are subject to the FEC's exacting reporting and disclosure requirements.³⁷ This means that, **as far as FECA alone is concerned, 501(c)(3)**

Many FEC regulations need to be changed to reflect the Court's decision in *Citizens United*, and currently pending and expected new litigation may continue to shift the rules.

organizations may make express advocacy communications. While it is highly unlikely, due to the IRC restrictions discussed above, that a 501(c)(3) would **ever** make a public communication that contains express advocacy, it is important to be aware that campaign finance law imposes no such restriction.

An organization engages in express advocacy when it unambiguously advocates the election or defeat of a clearly identified federal candidate. This occurs when it uses the candidate's name and the words "elect," "defeat," "vote for," or "vote against," but it can also occur in communications that do not include this language. The FEC definition of express advocacy encompasses numerous alternative kinds of speech, such as:

(a) Explicit statements such as "vote for the President," "reelect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "John Kerry in '04," "vote against Old Hickory," and "reject the incumbent;"

(b) Statements such as "vote Pro-Life" or "vote Pro-Choice" that are accompanied by a listing or depiction of clearly identified candidates who are described as "pro-life" and "pro-choice," and statements like "defeat" accompanied by the picture of a candidate; and

(c) Campaign slogans or individual words "that in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates," such as posters, bumper stickers and advertisements that say "Nixon's the One," "Lamar!" or "Obama/Biden."³⁸

The FEC express advocacy standard also covers an even more subjective class of communications, which the FEC defines as follows:

When taken as a whole and with limited reference to external events, such as the proximity to the election, [the communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) 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 candidate(s) or encourages some other kind of action.³⁹

This last definition is both imprecise and legally controversial; during the 1980s and 1990s numerous federal courts held it to be unconstitutionally vague,⁴⁰ and the FEC essentially stopped trying to enforce it. That changed, however, in 2006 and 2007, when the FEC reaffirmed its view that this standard is meaningful and valid in settling some significant enforcement cases (which are not precedential in any formal sense). For example, the FEC concluded that the following communications comprise express advocacy under this definition (whether or not the FEC is correct remains to be litigated):

- Saying during 2004 that Senator John Kerry is "clearly unfit for command of the armed forces of the United States" as the reason to contribute to the organization making that statement.⁴¹
- Saying during 2004 that "President Bush will be the best man to lead us in the war against terror" and "I don't think that Senator Kerry has what it takes."⁴²
- Depicting a beer can labeled "Pete Coors for Senate" with text in the form of a warning label saying "Warning: This candidate cares more about his bottom line than our kids' safety. Elect at your own risk."⁴³

An organization engages in express advocacy when it unambiguously advocates the election or defeat of a clearly identified federal candidate.

Corporations can make communications that constitute electioneering communications, but must adhere to the appropriate disclosure requirements.

The FEC also approved a settlement that took the view that pamphlets and print advertisements that extolled the leadership, issue positions, and records of various candidates without mentioning their candidacy or the election comprised express advocacy.⁴⁴ However, during 2008 four of the six FEC Commissioner positions turned over, and in declining to pursue numerous other enforcement cases the reconstituted FEC had made clear by publication time that there was no longer majority support for the view that commentary, whether in praise or criticism of a candidate, that lacked explicit references to the election or exhortations to support or oppose a candidacy amounted to express advocacy.⁴⁵ In one case three Commissioners also agreed that broadcast ads that respectively expressed explicit favor and disfavor about particular issue positions of two named competing presidential primary candidates did not constitute express advocacy.⁴⁶ Plainly, the scope of the concept is likely to remain the subject of dispute and litigation.

C. INDEPENDENT EXPENDITURES

FECA defines an “independent expenditure” as a payment for a communication that both “expressly advocate[s] the election or defeat of a clearly identified candidate” and is “not made in concert or cooperation with or at the request or suggestion” of a candidate, political party committee, or any agent or authorized committee of either.⁴⁷ A “clearly identified candidate” means a candidate who either is named, depicted in a photograph, drawing or some other representation, or is the subject of another “unambiguous reference.”⁴⁸

Due to federal tax law prohibitions on supporting or opposing candidates, 501(c)(3) organizations should never make independent expenditures.

D. ELECTIONEERING COMMUNICATIONS

BCRA added a new category of speech that affects incorporated nonprofits and unions—“electioneering communications.”⁴⁹ An electioneering communication is defined as:

- a broadcast, cable, or satellite communication (but not the Internet),
- whether or not paid for by its sponsor,
- that includes the name or likeness of a federal candidate,
- airs within 30 days of a primary, caucus, or convention, or within 60 days of a general election; and
- can be received by at least 50,000 persons in the referenced candidate’s electorate.⁵⁰

Corporations can make communications that constitute electioneering communications, but must adhere to the appropriate disclosure requirements. A 501(c)(3) corporation can make an electioneering communication so long as it does not cross the campaign intervention line. If a 501(c)(3) group’s aggregate spending on such permissible electioneering communications exceeds \$10,000 in a calendar year, then the group must file FEC Form 9 within 24 hours of attaining that threshold, and within 24 hours after every subsequent \$10,000 threshold. Mandatory disclosures include: the payer, amount, candidate named, and—perhaps most significantly—the names and addresses of all donors of at least \$1,000 to the 501(c)(3) since the previous year given for the purpose of furthering electioneering communications. A 501(c)(3) can set up a separate bank account comprised of donations by individuals (only) that are given for the purpose of financing its electioneering communications and then report only the \$1,000+ donors to that account.⁵¹ The FEC promptly posts filed Form 9s (and other reports) on its website, www.fec.gov.

E. CONTRIBUTIONS

Under FECA, a “contribution” includes anything of value given in order to influence a federal election, including gifts of money, goods and services, and loans, loan guarantees, and loan endorsements. So, a contribution can take either monetary form—cash, check, a credit card payment, or an automatic payroll deduction—or “in-kind” form, such as:

- donating office machines, furniture, equipment, or supplies to a campaign,
- directing or allowing staff to work for a candidate or political party during paid working time,
- giving a special discount on goods or services to a candidate, or
- communicating a pro-candidate message to the public in “coordination” with a candidate⁵² (see Section F in this chapter).

Under FECA, corporations, including nonprofits, and unions may not make monetary or in-kind contributions in connection with any election to federal office (unless they are federal PACs that have incorporated for liability-protection purposes). *Citizens United* did not change this prohibition on contributions. FECA permits contributions by **unincorporated** nonprofits but limits them to the same amounts that individuals may lawfully contribute.⁵³ But for IRC reasons alone, no 501(c)(3) may contribute to a federal candidate, political party, or other federal political committee. (See Chapter V, Section E) below concerning a 501(c)(3)’s provision of information to a campaign.)

F. COORDINATION

Under FECA, an “in-kind contribution” results when a nonprofit (or other) group “coordinates” certain public communications or other activities with a candidate or a political party. These are treated as contributions because the group is paying for something that the candidate or the party has indicated is valuable to it. A **“coordinated” expenditure is the opposite of an “independent” one**. “Coordination” has become one of the most contentious concepts in federal election law in recent years.⁵⁴ Coordination between corporations and candidates/political parties is still prohibited after *Citizens United*, and is likely to take on even more importance since any source may make express-advocacy communications to the general public, so long as they are not coordinated.

The FEC’s coordination regulations focus on what are “coordinated communications.” Generally, a communication is coordinated if (1) it is paid for by a group other than a candidate or a political party; (2) it meets an FEC “content” standard; and (3) it meets an FEC “conduct” standard.⁵⁵

Content that is covered by the coordination rules includes a “public communication”—that is, a communication via broadcast, newspaper, magazine, outdoor advertising facility, mass mailing, telephone bank, e-mail or the Internet—that contains **any** of the following:

- Express advocacy of the election or defeat of a candidate or the candidates of a particular political party,
- An “electioneering communication,” defined above,
- Republication of a candidate’s own campaign materials, or
- A reference to a clearly identified federal candidate, political party, or both, within certain periods before an election, and directed to voters in the jurisdiction of that candidate or where that party has candidates on the ballot. Generally covered are communications referring to a House or Senate candidate within 90 days of a nominating convention or primary, general or special election; references to a presidential or vice presidential candidate from 120 days before a presidential primary,

Under FECA, corporations, including nonprofits, and unions may not make monetary or in-kind contributions in connection with any election to federal office (unless they are federal PACs that have incorporated for liability-protection purposes).

caucus or convention until the November general election; references to political parties during a non-presidential election cycle within 90 days of a nominating convention, primary, general or special election; and references to political parties during a presidential election cycle from 120 days before a presidential primary, caucus or convention until the November general election.⁵⁶

It is important to remember that, uncoordinated or not, under the IRC a 501(c)(3) can never pay for express advocacy or reproduction of candidate materials.

It is important to remember that, uncoordinated or not, under the IRC a 501(c)(3) can never pay for express advocacy or reproduction of candidate materials. Other public communications may be permissible under the IRC for a 501(c)(3), but their coordination with a candidate, even in her capacity as an incumbent officeholder, could be problematic if it occurs during the pertinent periods and in the pertinent places under the coordination content rule. For example, coordinating a newspaper ad that supports a policy and mentions an officeholder-candidate's leadership role on the issue might be deemed a prohibited corporate in-kind contribution to that candidate.

Conduct that is covered by the coordination rules includes situations where a public communication is either:

- Created, produced, or distributed at the request or suggestion of a candidate or party
- Created, produced, or distributed at the suggestion of the payor of the communication, to which a candidate or party assents
- Subject to a candidate's or party's material involvement in decisions about its content, audience, means, mode, media outlet, timing, frequency, size, prominence, or duration or
- Created, produced, or distributed after a candidate or party conveys non-publicly available information about its plans, projects, activities or needs to the payor, and that information is material to the creation, production or distribution of the communication.⁵⁷

The coordination rules also apply in situations where a group and a candidate or a party use a **common vendor** that performs media, communications, polling, fundraising, political consulting and related services, or a group hires an **employee** or an **independent contractor** who **previously worked** for a candidate or a party. The coordination rules cover situations where that vendor, employee, or contractor worked for the candidate or party within the previous 120 days, **and** either uses for, or conveys to, the group non-public information about the candidate's plans, projects, activities or needs, **and** that information is material to a public communication by the group.⁵⁸ **This can mean, then, that the group and the candidate or party are unaware that they are “coordinating.”**

Although an important exception to the coordination rules is that an incorporated nonprofit may freely coordinate with a candidate or a party concerning the group's **internal** communications with its members and their families,⁵⁹ a 501(c)(3) must be especially careful in doing so due to the IRC's separate restrictions on partisan activity, which apply with equal force to a group's internal and external activities.

CHAPTER V:

Specific Activities

A. INTRODUCTION

501(c)(3) public charities may legally participate in many election-related activities. Each type of activity has its own set of do's and don't's. But remember, the IRS prohibits any 501(c)(3) from supporting or opposing candidates for public office, applying a highly situation-specific facts-and-circumstances test, as discussed in Chapter III. In many cases, there will not be a clear answer as to whether a particular activity is allowable; changing certain facts, sometimes by just a little bit, could increase or decrease the risk. In these cases, the public charity will need to determine what level of risk it is willing to accept to conduct the activity. It may choose to carry on with the proposed activity, modify it to reduce the risk, or forgo the activity entirely. Legal counsel is recommended in conducting this analysis.

This chapter divides into nine sections the many types of election-related activities in which 501(c)(3) may engage. Within each section, each type of activity is introduced and then is discussed separately according to IRC and FEC rules. 501(c)(3) organizations must comply with both.

B. ISSUE-FOCUSED ACTIVITIES

1. Issue Advocacy

“Issue advocacy” here refers to an organization communicating positions on issues of social, economic or philosophical concern that are related to the organization’s charitable or exempt purposes. Advocacy might include educating or attempting to influence the public on subjects such as health care, gun safety, worker rights or environmental protection. It could include persuading an elected official to take a specific action, like voting for or against proposed legislation (direct lobbying), or encouraging the public to ask elected officials to do so (grassroots lobbying). 501(c)(3) organizations can and often do use the occasion of an election to obtain greater exposure for their issues of concern.

The term “issue advocacy” is commonly used to mean all policy-related activities that do not cross the IRS line into prohibited campaign intervention. Such intervention includes “express advocacy” described in Chapter IV, Section B above, as well as less explicit electoral speech. Under both the IRC and FECA, the lines between these areas of speech are imprecise and often unpredictable.

a. Federal Tax Law

Federal tax law allows 501(c)(3) organizations to engage in issue advocacy—even when election campaigns are occurring. However, issue advocacy crosses the line into prohibited campaign intervention when a communication not only addresses an issue but also tries to tell the audience how to vote on a specific candidate or group of candidates. The IRS has said in the past that, “the real difficulty presented by advocacy communications on a specific topic during an election campaign is... the risk that the communication invites its audience to compare a candidate’s positions with the organization’s own views.”⁶⁰ This could be construed as implicitly favoring or opposing a candidate.

The IRS is most likely to interpret issue advocacy as intervention in a campaign when the issue involved is generally considered to be a high-profile issue on which the candidates in a specific election have diverging views and the issue has been used—either by the candidates, the media, or others—to highlight differences between the candidates.⁶¹ According to the IRS, “[e]ven if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating

Advocacy might include educating or attempting to influence the public on subjects such as health care, gun safety, worker rights or environmental protection. It could include persuading an elected official to take a specific action, like voting for or against proposed legislation (direct lobbying), or encouraging the public to ask elected officials to do so (grassroots lobbying).

The IRS does permit express advocacy of the passage or defeat of a ballot measure, so long as organizations stay within the lobbying limits applicable to 501(c)(3)s.

the political campaign intervention prohibition if there is any message favoring or opposing a candidate.”⁶² When discussing issues, organizations should avoid comparing their views with those of candidates or mentioning where candidates stand on the issues important to the organization. IRS guidance makes clear that campaign intervention can occur even if the name of a candidate or political party is not mentioned.⁶³

Also, 501(c)(3)s may not attempt to intervene in a candidate campaign by using “code words” such as “conservative,” “liberal,” “anti-gay,” or “pro-choice” in messages timed to improve or diminish the prospects for the election of candidates with whom they agree or disagree. The IRS frowns on 501(c)(3)s encouraging voters to “vote green,” “vote pro-life,” or “throw out the liberals,” in situations where the phrase refers to specific candidates, considering such forms of expression to be campaign intervention—supporting or opposing a candidate for public office.⁶⁴

The IRS applies a “facts and circumstances” analysis to determine whether a charity’s communication regarding an issue of concern to the charity is conducted in a nonpartisan manner or is really a veiled attempt to support or oppose a candidate. In Revenue Ruling 2007-41, the IRS identified specific factors for determining whether a communication comprises campaign intervention:

- Whether the statement identifies one or more candidates for a given public office,
- Whether the statement expresses approval or disapproval for one or more candidates’ positions and/or actions,
- Whether the statement is delivered close in time to the election,
- Whether the statement makes reference to voting or an election,
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office,
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election, and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office

In a previous ruling, Revenue Ruling 2004-6, the IRS also identified specific positive and negative factors that distinguish candidate campaign intervention from nonpartisan issue advocacy, but in the context of activities conducted by **noncharitable** 501(c) organizations that are permitted to engage in a certain amount of partisan election activity. The factors identified in this previous Revenue Ruling are listed in Appendix A. While they are similar to those listed above, they are not identical.

According to the IRS, a communication “is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.”⁶⁵ In any case, a 501(c)(3) must always have a bona fide non-electoral purpose for its actions. If it is possible that certain advocacy communications could be interpreted as being electorally biased, the organization should consider including in its materials a credible, explicit disclaimer of any candidate endorsement.⁶⁶ In addition, the organization’s internal records, such as board resolutions or any research or analysis conducted by the organization, should clearly articulate the non-electoral purpose for the activity or communication.

The IRS does permit express advocacy of the passage or defeat of a ballot measure, so long as organizations stay within the lobbying limits applicable to 501(c)(3)s.⁶⁷ Increasingly, however, ballot measures may be closely identified with a candidate who has either publicly endorsed or opposed the measure. A 501(c)(3) organization must be careful not to make its

communications “personal” by praising or attacking the candidate rather than focusing on the substance of the measure. The IRS will consider all relevant facts and circumstances when determining whether a charity’s ballot measure activities were really attempts to influence the outcome of a candidate election. In addition, as mentioned in Chapter II, ballot measure activities are often subject to registration and reporting requirements at the state or local level that are beyond the scope of this guide.

b. Federal Election Law

Chapter IV above describes speech that FECA prohibits or limits for nonprofit corporations, including 501(c)(3)s: coordinated public communications. As described below, FEC regulations also address voter guides, voting records, speech in connection with voter registration and get-out-the-vote efforts. Insofar as these entail restrictions on speech, *Citizens United* may have invalidated them.

The precise scope of “issue advocacy” remains to be determined, and that speech, if uncoordinated with candidates and parties, is generally not subject to reporting to the FEC (except for “electioneering communications”). Of course, a 501(c)(3) must also be mindful of the overlapping but not identical constraints imposed by the IRC. And, of course, unlike the IRC, FECA directly regulates group involvement only in federal elections, not state and local candidate elections or state or local ballot measures (there is no such thing as a federal ballot measure).

A 501(c)(3) organization’s track record of activity in non-election years is its best protection.

2. Commentary on Incumbent Officeholders

In connection with advocating on an issue of concern, a charity may be pleased or disappointed by a public statement, legislative vote, executive decision or other action of an elected public official. A charity may want to publicize its views by criticizing or praising an elected public official for her actions, regardless of whether or not the official is also a candidate in an upcoming election. It is important that a 501(c)(3)’s commentary not cross the line into prohibited campaign intervention.

a. Federal Tax Law

If a 501(c)(3) has a record of criticizing incumbents, lobbying them and working to hold them accountable, it may continue those activities during an election year. However, close to an election, the IRS may view positive or negative comments about someone running for re-election as “intervention” in the campaign. The facts and circumstances outlined in Revenue Ruling 2007-41, summarized in Section B above, may be helpful in determining whether criticism of an incumbent might be construed as supporting or opposing a candidate for public office.

A 501(c)(3) organization’s track record of activity in non-election years is its best protection. For instance, if it publishes a magazine of political commentary that is generally liberal or conservative, and it had been critical of Senator Clinton, Senator McCain, or House Speaker Pelosi since 2002, then it could continue to be critical of that officeholder in 2008, an election year in which each ran for office. Or, if the group has been pressuring legislators to adopt its views on certain legislation, and they vote against those recommendations, the group may keep on lobbying and calling public attention to how the incumbents voted, even during the election campaign.

But if the 501(c)(3) increases its level of criticism, devotes special issues of its publication to an incumbent’s bad (or good) record, or distributes more copies during the campaign, it may be found to have done so in order to intervene in an election in a partisan manner.

Voting records provide constituents with information about how their representatives performed, and can be a critical part of a lobbying campaign—showing constituents on whom they need to focus their persuasion.

b. Federal Election Law

Federal election law comes into play for a 501(c)(3) or other nonprofit group only if its criticism or praise of a federal elected official meets at least one of several conditions. It must include express advocacy, be part of an electioneering communication, satisfy the elements of a coordinated public communication, or fail to meet the FEC’s standard of what is appropriate in a voter guide, voting record or voter registration or GOTV message (assuming any of those latter restrictions survive *Citizens United*). If so, it is subject to prohibition or public disclosure (or both; if FEC disclosure rules apply to particular spending, its unlawfulness provides no exemption), as described in the following subsections. Otherwise, a group’s public commentary on the conduct or character of federal elected officials is not regulated by FECA. Nonetheless, it remains important to remember that FECA permits 501(c)(3)s (as with all corporations) to communicate in some ways that would violate their tax-exempt status under the IRC.

3. Voting Records

Voting records, sometimes also referred to as legislative scorecards, are compilations of the votes cast by incumbent legislators on bills; unlike voter guides, discussed at Section C(2), voting records focus on legislative votes of **incumbents**, not positions of candidates, even though many incumbents in the legislature may also be candidates for re-election or seeking some other office. Voting records may cover a single issue of interest to a limited public, or report on legislative votes on a wide range of issues. Voting records are typically issued shortly after the close of each legislative session and do not necessarily have an electoral aspect.

Voting records provide constituents with information about how their representatives performed, and can be a critical part of a lobbying campaign—showing constituents on whom they need to focus their persuasion. For organizations **other** than 501(c)(3)s, they can also be used as tools to signal voters for whom they should vote in an upcoming election, which is the ultimate way to hold representatives accountable for their legislative votes.

a. Federal Tax Law

The IRS has longstanding guidance for 501(c)(3)s that want to publish incumbents’ voting records, in the form of a “safe harbor”—a list of rules that, if the charity can follow them precisely, results in a nonpartisan voting record.⁶⁸ Generally, the safe harbor requires that the charity publish the voting record regularly (such as at the end of each legislative session), include incumbents regardless of their views, address a wide range of legislative subjects, avoid any editorializing or commentary on specific votes or voting patterns of any legislator, and avoid any explicit or implicit approval or disapproval of any incumbent’s voting record in the content or format of the publication.

If the charity’s activity falls outside the safe harbor, then the IRS will consider all the facts and circumstances to determine whether the voting record was biased or otherwise crossed the line into supporting or opposing candidates. For example, it could indicate campaign intervention if a charity were to significantly increase distribution of its voting records in election years. On the other hand, if a charity has been distributing voting records routinely for some time, and continues that activity without substantial change in an election year, campaign intervention probably has not occurred.

In one situation, the IRS found no support for or against a candidate when the distribution of the voter guides was minimal (a few thousand nationwide), was made only to the organization’s membership, and was not otherwise targeted in terms of time or geography to indicate electoral influence.⁶⁹ In addition, the charity:

- did not address a wide range of topics but only votes on specific issues of interest to the organization,

- made known its views on how incumbents should have voted on those issues, but nevertheless presented the votes of all incumbents,
- did not identify which were candidates, did not refer to elections, included no statements endorsing or rejecting any incumbents or addressing their overall qualifications for office, and
- pointed out the limitations of judging an incumbent on a few selected votes.

b. Federal Election Law

FEC regulations address voting records compiled about Members of Congress. They permit a corporation or union to prepare and publicly distribute such a record if this is done without coordination with a candidate or political party and the voting record includes no express advocacy.⁷⁰ After *Citizens United*, the prohibition against express advocacy is no longer valid. Consequently, voting records now **may** include express advocacy. Obviously, a 501(c)(3) must also comply with the IRC's more stringent content constraints.

4. Public Opinion Polling and Research

Public opinion research data can help 501(c)(3) organizations understand their constituents, set their policy agendas, establish priorities, and advocate for their positions. Charities use a variety of strategies to gauge public views, interest, awareness and level of concern about issues, including conducting or funding telephone polls, focus groups and other public opinion survey devices. Issues of partisan electioneering may arise where the polling data could be useful for electoral purposes, or where public opinion data is developed in cooperation with, obtained from, or provided to, partisan sources.

a. Federal Tax Law

Surveys of public opinion and focus groups addressing issues of concern are appropriate activities for 501(c)(3) organizations in the course of pursuing their charitable goals, and have many uses, as described above. Polling and other opinion research can be powerful tools for organizations developing strategy for a public education campaign, for example.

Charities must be very cautious if the poll includes questions that link an issue with candidates. It is highly recommended that they consult with legal counsel prior to proceeding.

Gathering polling information for use in designing a ballot measure, or developing messages about the ballot measure to be directed to voters, is usually a direct lobbying expenditure. Sharing the information a charity has gathered may also be an appropriate 501(c)(3) lobbying expenditure in a ballot measure election. However, sharing polling information with a candidate is riskier, and should be avoided without advice of counsel.

b. Federal Election Law

FECA does not regulate public opinion polling or research undertaken for internal, non-election-influencing purposes.⁷¹ But opinion polls are one of the few forms of information or other intellectual property that the FEC explicitly considers to be a thing of value subject to the various FECA contribution rules. If a 501(c)(3) provides a non-public poll to a candidate, political party, or other political committee, then a contribution occurs, unless either (a) the poll was previously made public (without coordination with the recipient), (b) the poll is over 180 days old, or (c) the recipient pays fair market value for the poll.⁷²

501(c)(3)s must be cautious in providing other kinds of research, information and intellectual property to political recipients lest they also be construed to have a market value and be considered to be in-kind contributions.

Public opinion research data can help 501(c)(3) organizations understand their constituents, set their policy agendas, establish priorities, and advocate for their positions.

C. VOTER EDUCATION

1. Appearances of Candidates, Their Surrogates and Party Officials

During an election season, candidates are among our most high-profile public figures. Having a candidate appear as a speaker at a 501(c)(3) organization's event can help improve turnout, whether to hear an educational message or to raise funds for the organization's programs. At other times, the 501(c)(3) may be interested in inviting the individual for reasons unrelated to the candidacy, such as because she is the incumbent in a public office who makes decisions affecting the 501(c)(3)'s area of interest, or because she has special experience or expertise in those areas. And candidates sometimes seek out 501(c)(3) organizations because they want to reach the organization's constituents as potential voters. 501(c)(3)s must navigate carefully in dealing with appearances by candidates or their surrogates. This section addresses appearances involving a single candidate, as opposed to candidate debates and forums, which are addressed in Section 3 below.

501(c)(3)s must navigate carefully in dealing with appearances by candidates or their surrogates.

a. Federal Tax Law

A 501(c)(3) may sponsor an appearance by a candidate or public official in some instances, but should proceed cautiously. The IRS will look at "all the facts and circumstances" to determine whether the organization is supporting or opposing a candidate. The initial question is whether the 501(c)(3) invited the person as a candidate or in some other capacity.⁷³

If the candidate were invited to appear as a candidate, the 501(c)(3) must take steps to ensure that it indicates no support of or opposition to the candidate at the event. No candidate or partisan fundraising should occur at the event, and all opposing candidates should be given an equal opportunity to participate, at either the same event or a comparable one. The IRS does not require that the opportunity be accepted by any of the other candidates, but the group should issue them a specific invitation to the same or comparable event. The IRS will evaluate whether an event was "comparable" based on all the facts and circumstances, including its time and place, expected audience, and attractiveness of venue. Note that federal election law, discussed below, may prohibit such an invitation in the case of federal candidates.

If the group invited the person in a capacity other than as a candidate, it does not have to invite the opposition, but it should document the reason for the invitation other than his or her candidacy and do everything it can to make sure that the event does not turn into a campaign appearance. This includes strictly avoiding any mention of the guest's candidacy or the election in connection with the event. The group also should refuse to work with the candidate's campaign staff on organizing the event because the campaign's job is to turn the event into a campaigning opportunity for its candidate. It is a good idea to send a letter to the speaker, telling her of the organization's inability to support or oppose candidates and the need to keep the event nonpartisan, and asking her not to mention her candidacy. The organization also should include a nonpartisan disclaimer on written materials and announce it during the event. If, despite the 501(c)(3)'s best efforts, the candidate does something unexpected to promote her election, or if the press interprets the event as a partisan one, then the IRS would likely not consider this to be the group's fault. If, however, an invited candidate promotes an event as a candidate campaign event, the charity should consider cancelling the event.

b. Federal Election Law

FECA generally prohibits corporations from hosting a federal candidate's appearance that is campaign-related at an event open to the general public, because it is a form of in-kind contribution. Of course, such contributions are impermissible for a 501(c)(3) under

federal tax law. Consequently, a 501(c)(3) cannot invite and present a federal candidate in her candidate capacity to speak to a general public audience, even if the group accords competing candidates comparable opportunities at the same conference or other event.

The FEC explicitly recognizes one circumstance where a 501(c)(3) may sponsor the public appearance of a candidate as a candidate or a political party representative. An incorporated 501(c)(3) educational institution may make its facilities available “in the ordinary course of business and at the usual and normal charge” to candidates and party representatives, without further restriction. Alternatively, it may do so (and invite the public, not just the “academic community”) at either no or a reduced charge if it takes steps to make the event an “academic setting” rather than a “campaign rally,” conveys no express advocacy, and does not “favor” any candidate or party in enabling the appearances.⁷⁴ None of these quoted terms has been defined.

FECA also permits an incorporated nonprofit to sponsor a candidate’s campaign appearance before its restricted class (its members, executive and administrative personnel, and their families), facilitate media coverage, and convey the group’s own partisan positions about the election at the event. The group need not also sponsor appearances by opposing candidates. Both the group and the candidate may solicit contributions at the event, but only the campaign may handle and collect payments.⁷⁵ Plainly, however, this option is unavailable to a 501(c)(3) under the IRC.

FECA further permits an incorporated nonprofit to sponsor a candidate’s or party representative’s campaign appearance before both its restricted class and the group’s other non-executive, non-administrative employees, and their immediate family household members (but not the general public), and to facilitate media coverage of the appearance, if the group:

- Allows the same opportunity in a similar manner to all candidates for that office who request to appear, or, in the case of a party representative, to representatives of other parties that field candidates and request to appear;
- Neither expressly advocates the election or defeat of any candidate for the office nor “promote(s) or encourage(s)” express advocacy by employees;⁷⁶ and
- Neither solicits nor handles contributions to the candidate, although the campaign may solicit (but not collect) contributions at the event.⁷⁷

Again, however, this sort of candidate appearance is unavailable to a 501(c)(3) under the IRC.

FECA does not restrict the public appearance of a candidate at an event sponsored by an incorporated nonprofit group if the candidate appears in an official, non-candidate capacity; that capacity is ordinarily easiest to demonstrate where the candidate is an incumbent public official. Such an event should specify the official nature of the appearance, and include no references to the election, let alone statements of support for or opposition to any candidacy. A 501(c)(3) group may sponsor such an appearance under FECA subject to the IRC standards discussed above. In contrast, where the candidate has no reason to appear other than her candidacy, it is likely to be deemed campaign-related regardless of the content of the event.⁷⁸

2. Candidate Questionnaires and Voter Guides

Candidate questionnaires or voter guides are printed or electronic materials that compare the candidates in a race, usually based on their positions on issues. The information in voter guides is often gathered through a questionnaire sent to the candidates in a race, as well as from public sources such as campaign websites and legislative records. They are often created by 501(c)s (other than 501(c)(3)s) or 527 political organizations for partisan purposes, such as a “green voter guide” that compares candidates’ positions on environmental issues

and that is distributed to voters who support environmental protection to let them know which candidates to vote for. But candidate questionnaires may also be distributed for purely informational purposes, without regard to helping or hurting any candidate or group of candidates; this sort of candidate questionnaire is appropriate for a 501(c)(3).

Candidate questionnaires should not be confused with voting records or legislative scorecards, which generally list how incumbent legislators voted on issues of interest to the publishing organization. Voting records are discussed at Section B(3) above. Publishing candidates' answers to a questionnaire is also fundamentally different from asking candidates to pledge to support a specific policy position or take a specific action if elected; pledges are discussed in Section E below.

In evaluating candidate questionnaires, the IRS mainly tries to decide if the overall impression given to the reader by the selection and presentation of issues "evidences a bias or preference with respect to the views of any candidate or group of candidates." Consider these examples:

- The Friends of the Parks asks the candidates for mayor one question: "What are your views on the operation of our city parks?" The answers, limited to 100 words, are printed in full and distributed to the public.

Arguably, this is a nonpartisan public service, particularly since voters are unlikely to learn the candidates' views on the parks any other way. The question contains no bias and does not reflect any organizational agenda. The IRS would hopefully agree, even though only a single narrow issue is being addressed.

If the Friends instead asked, "What will you do to increase funding for the city parks?" then the questionnaire would be biased, because it would suggest what answer the organization would prefer to hear.

- The Progressive Forum poses a broad range of questions to candidates for U.S. Senate, asking for a single-word answer, "Support" or "Oppose": "Do you support a woman's right to choose to have an abortion?" "Will you oppose repeal of the Endangered Species Act?" and "Do you favor cutting school lunch funds?"

Such questions likely reflect a particular agenda, and the answers are likely to indicate to the voter who the organization thinks is the better, more progressive candidate, and the IRS probably will not approve.

On the other hand, if the Forum stated the same questions more neutrally ("What is your position on the Endangered Species Act?") and mixed them in with questions about sending more troops to Afghanistan, repealing the gasoline tax, raising the minimum wage, and increasing jail terms for child molesters, the nonpartisan informational value of the questionnaire could overcome any suggestion that it was designed to favor certain candidates over others.

a. Federal Tax Law

Many nonprofit organizations develop or distribute materials about candidates' positions on issues. Only one IRS-approved purpose exists for such activities by a charity: to educate the voters impartially on a nonpartisan basis. 501(c)(3) organizations may not use candidate questionnaires to advance the electoral interests of some candidates or to disparage others. They may not design a questionnaire to put one candidate in a better light than another, nor in any way suggest how people should vote.

In one ruling, the IRS viewed the following fact pattern as permissible for a 501(c)(3) organization:

The League of Concerned People, as one of its activities in an election year, sends a questionnaire to all candidates for governor. The questionnaire asks for a brief statement of each candidate's position on a wide variety of issues, which the League selected solely on the basis of their importance and interest to the electorate as a whole. The League then publishes all of the responses in a voter guide made available to the general public.

Neither the questionnaire nor the voter guide, in content or structure, contains any evidence of a bias or preference for or against the views of any candidate.⁷⁹

A questionnaire that focuses on certain issues of concern to the organization would be riskier, but arguably proper if the questions truly evidence no bias. The reason the IRS prefers to see a broad range of issues (a good approach is to include at least three unrelated topics) is because wide-ranging topics are less likely to telegraph what the "right" answers are from the organization's perspective. The question remains, however, what constitutes an unrelated topic? For instance, are global warming and energy conservation different topics? Are clean water and clean air both environmental issues or are they two unrelated topics? The IRS has provided little guidance on this issue.

Accordingly, even with a wide range of issues, the questions presented to the candidates should not reflect the organization's "agenda." If they did, the candidates' answers would show how closely each candidate aligns with that agenda, which would imply that the organization preferred candidates whose answers are more aligned. Therefore the 501(c)(3) should not include with the questionnaire its issue agenda or statements describing the organization's positions on the issues.

Furthermore, the IRS has indicated⁸⁰ that it may relate information in a questionnaire or voter guide on one part of a 501(c)(3) organization's website, to a posting of the organization's issue agenda or positions on issues elsewhere on the website, or even relate material on the website to communications made outside the website. See the section below on Websites and Blogs for more information. Accordingly, organizations with high-profile well-known issues agendas much exercise extreme caution in their candidate questionnaire activity.

Organizations may find it easier to use open-ended questions, avoiding yes/no, support/oppose, or multiple choice formats unless they allow the candidates to explain their answers. Responses to closed-ended questions may make it too easy for a voter to decide whether candidates are good or bad based on their simple responses.

To stay on the safe side:⁸¹

- Send the questionnaire to **all** candidates.
- Ask open-ended questions in your questionnaire, or if you require the candidate to give a single-word answer like "support" or "oppose," give the candidate space to explain that answer.
- Do not include questions that hint at the "correct" answer.
- Avoid summarizing the questions and the candidate's positions in ways that may convey bias, such as by using phrases like "supports abortion on demand," "opposes affirmative action" or "supports a balanced budget." If you do summarize answers, you still need to include the candidate's narrative.
- Do not compare the candidate responses to the organization's views on the issues (for example, no pluses/minuses indicating when the candidate agreed/disagreed with the organization's position on an issue).
- Include questions on a broad range of issues. For example: questions on the impacts of poverty that address the issues of housing, education, healthcare, employment, and welfare reform reflect a broad range of issues.
- Print the questions and the candidates' answers in full (although you can impose a reasonable word limit on candidates, and strictly enforce it). Do not attempt to paraphrase the answers.
- Publish all responses in the same font, the same print size, and in an impartial way.
- Make the questionnaires generally available to the public.
- Do not coordinate with a candidate about questionnaire content (for example, do not change a question at the request of a candidate).
- If, but only if, a candidate does not respond, you can note that in the voter guide, and attempt to determine the candidate's position on the issues based on a neutral, unbiased, and complete compilation prepared from sources such as stump speeches, newspaper articles, campaign literature, the candidate's website, and the candidate's legislative votes on single-issue bills. If no clear determination of a candidate's position can be made, you may describe the candidate's position as "unknown" or "unclear." If the candidate's position is clear, you may include it, but the voter guide should indicate that the answer was not given by the candidate, and should include citations or state where citations are available, such as on your website. If, however, only one of two candidates responds, the organization will need to consider carefully whether to publish the questionnaire.
- It is always a good idea to prominently remind readers in the questionnaire that your organization does not endorse or oppose any of the candidates for public office, and to point out that candidates' fitness for office should be judged on a variety of qualifications that go beyond their responses to questions.

Organizations may find it easier to use open-ended questions, avoiding yes/no, support/oppose, or multiple choice formats unless they allow the candidates to explain their answers.

b. Federal Election Law

Under Federal election law, nonprofit corporations may elicit information from candidates about their policy positions and distribute voter guides comparing them on the issues in accordance with certain guidelines. Corporations may distribute voter guides, even those that were prepared by other 501(c)(3) or 501(c)(4) organizations, as long as there is no coordination with a candidate about questionnaire content. After *Citizens United*, the guide may include any information and advocacy.

For a 501(c)(3), these FEC rules likely impose no greater constraints than are imposed by the IRC.

3. Candidate Forums and Debates

501(c)(3) organizations often attempt to educate voters and encourage voter participation by sponsoring candidate forums or debates before primaries or a general election. A forum is typically a public meeting or assembly allowing for open discussion of issues by candidates where candidates appear **sequentially**, in contrast to a debate where candidates directly engage each other at the same time on particular topics in accordance with carefully drawn rules. Both the IRC and FECA permit 501(c)(3)s to sponsor a forum or debate, according to complementary guidelines.

a. Federal Tax Law

Federal tax law permits 501(c)(3)s to sponsor nonpartisan forums or debates between candidates. The IRS has identified the following factors⁸² in determining whether a candidate debate or forum results in campaign intervention:

- “Whether the organization provides an equal opportunity for participation to all viable candidates seeking the same office.”⁸³
- “Whether the organization indicates any support for or opposition to a candidate (including candidate introductions and communications concerning the candidate’s attendance).” Organizations cannot show any preference for one candidate or party—either by explicit statements or by expressing support for a candidate’s ideas or positions.
- “Whether questions for the candidates are prepared and presented by an independent nonpartisan panel.” Questions should be asked that represent wide-ranging interests rather than a narrow perspective.
- “Whether the topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the office sought and are of interest to the sponsor’s members or to the general public.” A narrow set of issues may suggest support for a candidate, particularly if it looks like the answers you are seeking mirror the organization’s views on the issues.
- “Whether each candidate is given an equal opportunity to present his or her view on each of the issues discussed.” The moderator should treat each candidate fairly, and not provide one candidate with more favorable treatment, such as allowing only one candidate to exceed the pre-set time limit.
- “Whether the candidates are asked to agree or disagree with the positions, agendas, platforms, or statements of the organization.” The goal of the debate or forum cannot be to suggest (whether implicitly or explicitly) which candidate is “good” or “better” on the issues. The organization must avoid comparing its views with those of the candidates.
- “Whether a moderator comments on the questions or otherwise implies approval or disapproval of the candidates.” The moderator should be neutral and act in an unbiased manner, and should make a statement at the beginning and end of the program noting that the views expressed were not those of the sponsoring organization.

A forum is typically a public meeting or assembly allowing for open discussion of issues by candidates where candidates appear sequentially, in contrast to a debate where candidates directly engage each other at the same time on particular topics in accordance with carefully drawn rules.

The organization should not invite people from particular viewpoints to be part of the audience. The goal is to avoid having an audience that is supportive of one candidate and hostile to another. Organizations should publicize the event widely and not just to groups that have relationships with them.

Whether a debate or forum is nonpartisan depends on a facts and circumstances analysis. None of the above factors alone is determinative, but rather would be considered in light of all of the surrounding factors in any particular case.⁸⁴ This debate format is not the only one that the IRS may accept. If you want to use a different format, be sure to seek competent legal advice.

It is not always practical for an organization to invite all of the candidates, especially if the number of legally qualified candidates for a particular office is very large. The IRS has indicated that a charity may invite fewer than all of the candidates if reasonable, objective criteria are consistently and non-arbitrarily applied to decide whom to invite (such as only those who have received a certain share of popular support as reflected in at least one recent recognized credible and independent poll).⁸⁵ The criteria cannot be designed to exclude a particular candidate.

If all candidates appear at the debate or forum to speak, it may be permissible to permit all candidates to distribute campaign literature. Absent this circumstance, the IRS has considered it “imprudent to permit such distribution.”⁸⁶

It is unclear when a candidate’s refusal to participate after being invited prevents the charity from holding the debate or forum at all. Organizations should consult with legal counsel before deciding to go forward under these circumstances—particularly if only one candidate has accepted the invitation.

The IRS does allow a 501(c)(3) to hold a debate or forum during the primary season limited to candidates for one political party’s nomination.⁸⁷ And, the organization need not hold such a debate or forum for both parties.

Although it is permissible to conduct a candidate forum, a charity cannot publish a final report of the event containing any ratings or evaluations of the candidates, as this would constitute support for or against a candidate.⁸⁸

b. Federal Election Law

Notwithstanding the FEC’s general rules against corporate sponsorship of public candidate appearances, FEC allows both 501(c)(3) and 501(c)(4) organizations to stage candidate debates if the group satisfies certain conditions. If viewed as exceptions to the usual coordination rules rather than as restraints on the sponsor’s speech, these conditions likely remain lawful after *Citizens United*.

Under these rules, at least two candidates must participate and meet face-to-face, and pre-established objective criteria must be used to select those who will. If circumstances beyond the organization’s control arise, however, such as bad weather preventing one candidate from showing up, the organization is not required to cancel the debate.⁸⁹

A pre-primary election debate may be limited to candidates for a single party’s nomination, and the organization need not sponsor a debate among any other party’s candidates.

The FEC regulations further permit eligible organizations that stage debates to solicit corporations and unions that have endorsed candidates to donate funds in order to defray the organization’s debate event costs, even though those groups themselves could not sponsor the debate; these donations are exempt from the FECA definition of a “contribution.”⁹⁰ Such donations should come with no strings attached concerning any aspect of the debate—particularly when sought by 501(c)(3) organizations.

Notwithstanding the FEC’s general rules against corporate sponsorship of public candidate appearances, FEC allows both 501(c)(3) and 501(c)(4) organizations to stage candidate debates if the group satisfies certain conditions.

An organization’s publicity about the debate and the debate itself are not covered by the “electioneering communication” disclosure requirements.⁹¹

The FEC has declined to apply its debate rules to candidate forums, even if they are conducted by a 501(c)(3) without partisan preference among candidates or parties. Instead, the FEC considers a forum to be a series of candidate appearances.⁹² This is one of the few instances in which the FEC prohibits what the IRS allows. Therefore, 501(c)(3)s that want to hold a forum with federal candidates must, in addition to complying with the IRC, also follow the more restrictive FEC rules.

4. Internal Communications

The federal tax and election law restrictions described so far principally address an organization’s communications with, or activities involving, the general public. The FEC’s rules are different in some instances when an organization is communicating only with its own members, directors, or staff. However, the IRC’s prohibition on supporting or opposing candidates for public office extends to these internal communications as well.

a. Federal Tax Law

Federal tax law does not distinguish between election-related communications on the basis of whether they are external or internal. The IRS therefore does not allow 501(c)(3) organizations to send communications to their members or employees telling them how to vote.

However, when communicating about ballot measures—considered permissible lobbying activity within limits under the IRC so long as it is conducted in a nonpartisan manner—the audience may make a difference. For 501(c)(3) organizations that have elected under Section 501(h) of the IRC, communications between the organization and its members regarding ballot measures of direct interest to the organization are subject to special rules. As described in *Being a Player*, a communication to an organization’s members “which refers to and reflects a view on legislation **does not** count as lobbying **even** if it asks members: to sign or circulate petitions necessary to place an initiative on the ballot; or to vote for or against an initiative.”⁹³ For tax purposes, a person is a member of a charity if the person pays dues or makes a contribution of more than a nominal amount of time or money, or is one of a limited number of honorary or life members; voting rights are not required. For more information regarding the lobbying rules affecting public charities communicating with its members, see *Seize the Initiative*.

b. Federal Election Law

501(c)(3)s, like other nonprofit corporations and unions, may spend their general funds on express advocacy to their members, executive and administrative staff, and their same-household immediate family members, just as they can communicate to the general public.⁹⁴ But, for IRC reasons, a 501(c)(3) should never undertake express advocacy, even internally to its staff or its members.

5. Websites and Blogs

It has become standard, and as a practical matter often necessary, for a 501(c)(3) organization to have an Internet presence. Websites provide and collect information, raise funds, conduct advocacy, present the charity’s brand, as well as link to websites of other organizations, among other things. Web logs, or “blogs” for short—frequently-updated narratives on current issues or perspectives relating to the charity’s work—are a common feature of many charity websites. Websites and blogs play a major role in politics and elections today, and charities need to know how they can lawfully use them to carry out their charitable purposes.

Federal tax law does not distinguish between election-related communications on the basis of whether they are external or internal.

a. Federal Tax Law

The IRS views websites as just another form of communication. If a 501(c)(3) posts something on its website (including a blog) that favors or opposes a candidate for public office, then the IRS treats the organization the same as if it had distributed printed materials or broadcasts that favored or opposed that candidate.⁹⁵ In addition, a charity's website is considered an asset that the charity may not allow others to use for partisan activities, even if the material is clearly identified as coming from a third party (including a blogger).⁹⁶

While the IRS understands that a charity cannot control which other websites may link to the charity's, it has suggested⁹⁷ that it will hold charities responsible for links they establish to other organizations' websites even though the charities do not control the content of the other website. Therefore, it's important for charities to monitor the content of linked websites, and take remedial action when necessary.

On July 28, 2008, Marsha Ramirez, director of the Exempt Organizations Examinations for the IRS, sent a directive to IRS staff that set out how the IRS treats web links.⁹⁸ The IRS stated that it would not pursue investigations concerning mere links between the website of a 501(c)(3) and the home page of its related 501(c)(4), but offered no such guarantee regarding links between a 501(c)(3) and an unrelated group. Until the IRS provides further enforcement guidance, this directive remains in effect.

With respect to a 501(c)(3) organization that links to content of an **unrelated** 501(c)(4) organization, the IRS will use a facts and circumstances analysis to determine whether the 501(c)(3) is promoting, encouraging, recommending or otherwise urging viewers to use the link to get information about candidates and their issues. If the facts and circumstances suggest that the 501(c)(3) is using the link to the 501(c)(4) in this manner, a PACI investigation may ensue. Some of the factors the IRS considers in evaluating whether a particular link constitutes a violation of the prohibition against supporting or opposing candidates include:

- The context for the link on the charity's website (e.g., does the text surrounding the link say "To take action, click here" or "To learn more, click here," or "For reasons to vote against Candidate X, click here"?);
- Proper charitable purposes served by offering the link on the charity's website;
- Directness of the links between the charity's website and web pages that contain material that favors or opposes a candidate for public office (practitioners sometimes refer to the number of clicks, with more clicks reducing the probability of attributing candidate-related materials on the linked website to the charity); and
- In the context of links to candidates' websites, whether all candidates in a race are included.

However, the IRS provides another caution to 501(c)(3) organizations. According to the IRS,⁹⁹ taking a position on an issue and providing information about candidate positions on the same issue places the organization at risk for intervening in a candidate campaign. This is true "even if the two elements are in separate parts of the organization's Web site, or if one element is on the Web site and the other is not. Factors to be considered in analyzing the connection between the elements include, but are not limited to, timing, proximity and references between the elements."¹⁰⁰

Listserve maintained by charities are email distribution lists that allow all participants to email messages to the entire listserve. Chatrooms, electronic bulletin boards, public blogs, and applications such as MySpace and Facebook, all allow third parties to post information or opinions on a charity's website or application site. Each of these facilities could be used for supporting or opposing candidates, and if it appears that may have happened the questions

If a 501(c)(3) posts something on its website (including a blog) that favors or opposes a candidate for public office, then the IRS treats the organization the same as if it had distributed printed materials or broadcasts that favored or opposed that candidate.

the IRS will ask are: Why did the charity establish the listserve/ chatroom/ bulletin board/ blog/ application page? What charitable purposes does it serve? And should the campaign intervention content of third-party messages be attributed to the charity, under all the facts and circumstances? The charity's control over a listserve or its acting as the moderator of the listserve would be factors supporting the attribution of third-party messages to the charity.

Many questions remain unanswered about how the IRS will treat various scenarios involving websites, charities, and partisan electoral activities. Additional guidance in this area can be expected.

b. Federal Election Law

Perhaps due to its more formal and publicized regulatory activity compared with that of the IRS, the FEC has been the object of much more intense public scrutiny and comment as it has delved into the application of FECA to the Internet. Overall, the FEC has taken a hands-off approach to Internet activity and blogs wherever it has concluded that FECA accords it discretion to do so.¹⁰¹ As a result, FECA permits nonprofits to undertake some on-line activity that the IRC prohibits for 501(c)(3) organizations.

If a corporation's website that is reachable by the general public includes a mere link to a political committee's website, that link is treated as neither a FECA-regulated expenditure nor a contribution.¹⁰² The FEC's rules with respect to coordination, voter guides, voting records, voter registration, GOTV activities and re-publication of campaign materials pertain to the Internet,¹⁰³ although the costs, and therefore the FECA penalties incurred, in an Internet violation are ordinarily much less than those resulting from violations using other media. Remember, however, that all 501(c)(3) organizations must comply with the most restrictive IRC rules. See Chapter VI below for a discussion of penalties and enforcement.

For an individual, including a blogger (whether or not incorporated), email and Internet communications are exempt from FECA's restrictions and disclosure requirements except for the placement of an advertisement on another person's website for a fee.¹⁰⁴ This accords opportunities for individuals who work for 501(c)(3)s to engage in political activities in their personal capacities and using their personal resources; but a blogger acting on behalf of a 501(c)(3) is an agent of that organization and is subject to the FEC (and IRS) rules that apply to it.

6. Distribution of Candidate or Party Materials

A 501(c)(3) organization may be asked to distribute, or allow another organization to distribute, a candidate's or political party's campaign materials, such as bumper stickers, posters, buttons or slate cards (cards that list preferred candidates), at one of its events or as part of materials that the 501(c)(3) distributes to the public. As described below, doing so violates both the IRC and FECA.

a. Federal Tax Law

501(c)(3) organizations cannot pay for distribution of, or allow their staff or facilities to be used to distribute, partisan campaign materials. A 501(c)(3) should not provide space for political tables at events unless it can demonstrate equal access to all candidates. Similarly, a 501(c)(3) should not allow representatives of any other organization, including a Section 501(c)(4), 501(c)(5), or 501(c)(6) organization or a Section 527 political organization, to distribute partisan materials or make partisan statements at any charity event.

b. Federal Election Law

Under FECA, the republication or distribution of partisan materials prepared by a candidate or a political party—whether or not such activity is coordinated with that preparer, and whether or not the recipients are a group's restricted class or the general public—is

Overall, the FEC has taken a hands-off approach to Internet activity and blogs wherever it has concluded that FECA accords it discretion to do so.

a form of “in-kind” contribution to the preparer.¹⁰⁵ That means republication is subject to contribution limits for an unincorporated 501(c)(3), and is an unlawful contribution by an incorporated 501(c)(3). In any case, the IRC forecloses any such re-publication by a 501(c)(3).

FECA allows corporations to use brief quotes or excerpts from campaign materials in order to demonstrate a candidate’s position as part of the corporation’s expression of its own views.¹⁰⁶ This exception will be of use to 501(c)(3) organizations only if they can refer to a candidate in a manner that conveys no partisan message.

7. Endorsements

Most 501(c)(3) organizations understand that they may not explicitly endorse or oppose candidates for elected public office. An endorsement includes not only explicit statements of support or opposition, such as “vote for Senator Brown” or “defeat Senator Green,” but also implicit endorsements such as appearances at campaign events. An individual who works for or is otherwise associated with a 501(c)(3) organization may personally endorse or oppose a candidate, but it is important that this action not be attributable to the organization.

a. Federal Tax Law

Individuals associated with 501(c)(3) organizations are free to endorse, support, or oppose candidates, so long as it is clear they speak for themselves only and not for their organizations. The IRS has indicated that leaders of a 501(c)(3) organization and other individuals may personally endorse candidates so long as they do not in any way utilize the organization’s financial resources, facilities or personnel. It is also helpful to clearly and unambiguously indicate that the actions taken or statements made are those of the individuals and not of the organization.

- **Avoid Use of Charity Resources.** An individual should make an endorsement only on his or her own time (when not being compensated by the charity) and should not use the charity’s email account, stationery, logo, telephones, copy machine, or office space in connection with making or preparing the endorsement. There should be no reporting or publishing of the individual’s endorsement in the charity’s newsletter, website, or other publications, and the individual should not be permitted to use the charity’s events as a platform for any candidate endorsement. Even if an individual pays for the cost of the publication that includes an endorsement, it is still campaign intervention if the publication is an official publication of the organization.¹⁰⁷
- **Use Disclaimers.** To avoid potential attribution of their personal endorsements or other comments, individuals should clearly indicate that their comments are personal and are not intended to represent the views of the organization. For instance, if you are on the staff or board of a 501(c)(3) and you support a particular candidate, the safest course is not to disclose your organizational affiliation. If the individual’s association with the charity will be mentioned in materials relating to an event, the materials should state that the organization is named for identification purposes only, and that no endorsement of a candidate by the organization should be inferred.

In prior guidance, the IRS encouraged the use of disclaimers by individuals to avoid potential attribution of their comments made in an individual capacity.¹⁰⁸ Revenue Ruling 2007-41, in contrast, did not include this suggestion. It is unclear whether this omission suggests that the IRS does not believe these disclaimers to be effective, does not want 501(c)(3) leaders to rely too heavily on their use, or did not want to create the presumption that disclaimers were required to avoid attribution.

Note that a disclaimer saying that the partisan political views being expressed are those of the individual will not save the 501(c)(3) organization from electioneering if the organization’s newsletter, publication, or official function, is the vehicle—even if

the individual reimburses the charity for the costs allocable to the partisan portion of the content. The IRS will attribute the content of a charity's publications and events to the charity.

A charity may also want to monitor how its positions, or statements made by individuals affiliated with it, are presented in the media. If a news article, for example, mischaracterizes a charity as having endorsed a local candidate, the charity should ask, in writing, for a correction from the media outlet, and keep a copy of its request and any response in its files. Having a charity's board of directors pass a resolution setting out the charity's nonpartisan position, or posting a nonpartisanship statement on the charity's website, may also be helpful if done in good faith.

501(c)(3) organizations electing under Section 501(h) may openly endorse ballot measures, which is a permitted lobbying activity.¹⁰⁹

b. Federal Election Law

In general, the endorsement of a federal candidate is a subset of express advocacy, and is subject to the FEC's usual express-advocacy rules explained above.¹¹⁰

Under FECA, an individual officer, employee, or other representative of an organization may endorse a candidate without implicating organizational responsibility if she does so in her personal capacity and not as an agent of the group. The group cannot be involved in that personal conduct. An individual endorsement may be accomplished by the individual making the endorsement during non-working time, eschewing any indication of organizational responsibility, and, most prudently, affirmatively disclaiming any.¹¹¹ FECA generally recognizes that an "agent" relationship exists only if an individual has actual authority to act on behalf of a group.¹¹²

See the section on Personal Electoral Activities of 501(c)(3) Staff, Volunteers and Board Members for a more complete discussion.

D. VOTER REGISTRATION & GET-OUT-THE-VOTE (GOTV) ACTIVITIES

In order to vote, U.S. citizens must first register to vote. The voter registration process is largely governed by state law and varies from state to state. In some states the process must be completed well in advance of Election Day. Especially for younger or first-time voters, non-English speakers, those for whom English is not their primary language, and newly-sworn citizens, registering to vote can be a daunting and confusing process. 501(c)(3) organizations may want to encourage and assist those eligible to register.

Once voters are registered, 501(c)(3) organizations may want to encourage them to actually vote when Election Day arrives. "GOTV" refers to any activities designed either to help registered voters get to the polls (such as reminder calls, or providing polling place information or rides), or to help them with the actual voting process (such as sample ballots, translation of ballot instructions and mock voting machines). Both the IRC and FECA enable 501(c)(3)s to undertake these activities, within certain constraints.

1. Federal Tax Law

A 501(c)(3) group can conduct nonpartisan voter registration and GOTV activities, or even operate a nonpartisan voter registration or GOTV drive.¹¹³ The activities must be designed solely to encourage voting by all those eligible, such as by educating the public about the importance of voting, and must not evidence any bias for or against any candidate or party.

When choosing target areas for the activities, a 501(c)(3)'s criteria must be neutral and nonpartisan. For instance, it may target low-income, minority, low-turnout, homeless or student populations to exercise their right to vote because they are typically under-represented at the polls. It may not target groups because they belong to a particular political

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party, because they voted a particular way in the past, or because they vote in a district where the race is likely to be close.

A 501(c)(3) may focus on registering people who live in the area it serves or are part of its regular constituency (apart from its voter-related activities), such as clients and patients and their families, or members. However, it cannot deny voter registration or GOTV services based on party or candidate preferences to those who request them.

A charity may encourage people to vote by mentioning the critical issues involved in the election, so long as it selects and presents those issues in a way that does not encourage people to vote for a particular candidate or party.

Issue advocacy and nonpartisan voter registration—both proper 501(c)(3) activities by themselves—are, however, not always an easy fit together. In determining the permissibility of a voter registration slogan, ask yourself: Why are we mentioning this issue in connection with voter registration? Are we trying to encourage people to vote for candidates who agree with our view? Even if we are only trying to overcome voters' apathy, is the slogan susceptible to being seen as biased for or against any candidate?

In answering these questions, one must consider both the message and the target audience. For instance, declaring, "The next Congress will decide our policy on logging in the national forests" to infrequent voters under 30 is probably acceptable because

- the issue is stated neutrally, and
- young voters on either side of the issue may be moved by it.

However, the same statement made to members of environmental groups or residents of lumber towns suffering high unemployment may be found partisan and unacceptable.

Consider these slogans:

- "We want our government to hear about the needs of the elderly. Register and vote."
- "Our government has been ignoring the needs of the elderly. Register and vote."

The first statement is a nonpartisan call for older people to vote so that their voices may be heard. The second statement may suggest that elderly people should vote to change the government, and is therefore riskier than the first statement. When evaluating such cases, the IRS looks at all of the surrounding facts and circumstances, including statements of intent reflected in board meeting minutes and other internal correspondence, the timing and targeting of the message, and any other materials provided to voters about the candidates, incumbent officials, the issues or the upcoming election.¹¹⁴

During the voter registration or GOTV campaign, a 501(c)(3) must instruct its employees and volunteers to avoid saying or writing anything that would indicate any partisan purpose, motive, or hoped-for result. For example, the IRS challenged the tax-exempt status of a group that sent out a fundraising letter boasting that its voter registration drive had helped propel a particular candidate to victory.¹¹⁵ See Chapter V, Section J "Fundraising."

Here are some examples of what 501(c)(3)s can and cannot say with legal confidence in voter registration campaigns:

NOT ADVISABLE

"Vote to protect the environment. Register here."

"Let's get out the pro-life (or pro-choice) vote. You can register here."

"Don't get Bushed this Election Day. Register here to vote for change."

"We just can't afford more of the McSame. Register here to vote on November 4, 2008."

"Support ethics in government. 2006: Congress. 2008: The Presidency. Register now."

"Budget cuts are reducing services provided by this agency. Register to vote here, and let the candidates know you won't take it anymore."

SAFE

"The next election will set the country's course on civil rights, health care, welfare, jobs, taxes, support for the arts and the environment. Your vote counts. Register now."

"Challenge authority. You're 18, and you haven't registered to vote? Why not here? Why not now?"

"You can have an impact on the decisions affecting your life. Register to vote now."

"Housing. Human services. Jobs. You count. Register and vote."

One way a 501(c)(3) organization might want to influence the future public policy environment on its issues is to reach out to future policymakers before they are elected, educating them while they are still candidates about issues important to the organization.

2. Federal Election Law

FEC regulations have long imposed particular and in some senses idiosyncratic requirements on groups, including 501(c)(3)s, that undertake a voter registration or GOTV drive directed at individuals beyond its restricted class.¹¹⁶

- The voter registration and/or GOTV drive includes no express advocacy regarding candidates or political parties;
- The voter registration and/or GOTV drive is not coordinated with any candidate or party;
- The registration drive is not directed primarily at individuals who previously were or intend to register with a favored political party;
- The GOTV drive is not directed primarily at registrants in a favored party;
- Services connected with a voter registration and/or GOTV drive, such as free transportation or voting information, are provided without regard to voters' candidate or party preferences, and the group notifies recipients of these services in writing of this policy; and
- Individuals hired to carry out the drive are not paid on the basis of the number of voters who are either registered or transported and who support a particular party or candidate.

Plainly, the express-advocacy restriction does not satisfy *Citizens United*; the others may not either, except for the preclusion of coordination, which remains an enforceable aspect of the FECA prohibition on most institutional contributions, and perhaps the proscription of predicated payment on partisan criteria (which does not have a clear grounding in FECA in any event).

The FEC similarly directs that a group's communications to the general public about voter registration or GOTV, such as broadcast or print media ads that do not involve the direct provision of related services, such as rides to the polls, must avoid candidate or party coordination.¹¹⁷ That too appears to survive *Citizens United*.

Subject to state law, a nonprofit corporation may also reproduce and distribute to the general public originals or copies of official government-produced voting information, registration forms and absentee ballots, so long as they avoid coordination or "encourag[ing]" registration with a particular party.¹¹⁸ (This restraint against "encouragement" is likely unenforceable at least insofar as it deals with uncoordinated activity.) As long as this is done in compliance with the IRC and related state laws, this may be a fruitful activity for 501(c)(3) organizations. Also, state law permitting, a corporation may donate funds to a state or local government to help defray its costs of printing and distributing official information.¹¹⁹

E. CANDIDATE EDUCATION

1. Influencing Candidates' Policy Positions

One way a 501(c)(3) organization might want to influence the future public policy environment on its issues is to reach out to future policymakers before they are elected, educating them while they are still candidates about issues important to the organization. For example, an organization that works to reduce lead levels in local drinking water may want to ensure that every candidate for mayor understands the dangers of high lead levels in the city's water system. These efforts may occur through personal visits, phone calls, mailing materials, or hosting issues briefings for candidates or their staffs.

a. Federal Tax Law

The IRS has not issued guidance—precedential or otherwise—directly addressing how 501(c)(3) organizations can seek to influence candidates' policy positions. However, by analogy to IRS guidance on other topics, practitioners have developed guidelines for educating candidates in a nonpartisan manner. A 501(c)(3) organization should be able to visit, call, or send materials to candidates addressing issues related to the organization's mission and/or constituency. The communications may not, of course, contain messages that explicitly or implicitly favor or oppose any candidates by name and should exercise caution in doing so by their position on issues. The communications should be offered to every candidate in a race (even if the 501(c)(3) is certain some candidates will ignore it), and an effort should be made to ensure that each candidate is provided identical or equivalent communications. The charity may prepare materials specifically to be used in briefing all candidates, but it should resist the temptation to prepare materials in response to candidates' individual requests (e.g., "What does your organization think should be the city's policy on charter schools?"). That is because the IRS could view this as providing services preferentially to one candidate, who otherwise presumably would have to pay staffers to develop her policy. A 501(c)(3) may always provide information to candidates on request that it would also provide to any member of the public who asked, and it need not provide such information to all candidates in the race (although offering the information to each candidate would clearly demonstrate nonpartisanship).

Note that if the candidate is an incumbent legislator, the communication may be considered direct lobbying (which is permitted, within limits, for a 501(c)(3) public charity) if it supports, opposes or otherwise reflects a view on a specific legislative proposal. If the communication makes no reference to legislation, then no lobbying occurs. When providing information to someone in his or her role as an incumbent legislator rather than as a candidate, a 501(c)(3) should make sure to send it to the legislative office, not the campaign office.

501(c)(3)s are allowed to try to persuade candidates to agree with them on issues and urge candidates to make their views on the charity's issues known—but that is as far as they may go. The IRS has said that a 501(c)(3) may not ask the candidate to pledge to support its position on an issue if elected, or to take specified actions either during the campaign or if elected, because that would imply that the group favors candidates who agree to make the pledge and opposes those who refuse.¹²⁰

A 501(c)(3) may publicize its own issue agenda during an election period, but it may not directly approach candidates and ask them, in effect, to endorse the organization's agenda. See Section 2, above, "Candidate questionnaires and voter guides."

b. Federal Election Law

FECA permits a corporation to communicate with candidates for federal office to try to influence them to agree with the organization's positions.

The FEC treats such communications as issue advocacy rather than campaign activity so long as the effort does not advocate that supportive candidates be elected.¹²¹ Also, FECA does not regulate dealings with a candidate in her official capacity as an incumbent officeholder, including activities that comprise lobbying. But the FEC does not permit a 501(c)(3) (or anyone else) to compile from a federal candidate's FEC reports a list of her contributors and then target them with policy or lobbying messages in order to encourage them to influence that candidate or take other action, even if this is done in a strictly nonpartisan manner.¹²²

Nonprofits may provide candidates with the same research materials that they distribute to the general public and others. However, providing issue research or polling data having a fair market value to certain candidates and not to others may be an in-kind contribution.

FECA permits a corporation to communicate with candidates for federal office to try to influence them to agree with the organization's positions.

See Chapter IV, Section F. Also, in all of its dealings with a candidate or his campaign, a 501(c)(3) must be mindful of the FEC's coordination rules—as well as the federal tax rules. See Chapter IV, Section F.

2. Influencing Political Party Platforms

Political parties develop “platforms” describing their fundamental principles. Individual components of the platform are sometimes referred to as “planks.” Party platforms are generally amended in presidential election years at each major party’s nominating convention, although a platform committee may begin its work well in advance of the convention. The presumptive nominee in each party has great influence over the party’s platform. For example, in 2008, the Obama campaign used a series of house parties and other events to gather advice and input on the platform.

Although platforms are often more symbolic than real policy commitments, getting a particular viewpoint or policy statement incorporated in a platform can help educate the public on the issue, increase interest in a charity’s position, and improve the outlook for policies favored by the charity to be implemented after the election if that party’s candidates prevail.

Although platforms are often more symbolic than real policy commitments, getting a particular viewpoint or policy statement incorporated in a platform can help educate the public on the issue, increase interest in a charity’s position, and improve the outlook for policies favored by the charity to be implemented after the election if that party’s candidates prevail.

a. Federal Tax Law

In the context of its issue advocacy or lobbying, a 501(c)(3) may work to get its positions on issues or legislation included on a political party’s platform, so long as its efforts to do so are conducted in a nonpartisan manner. This can be shown by:

- delivering the charity’s position statement (called “testimony”) to **all** major political parties’ platform committees; and
- including a disclaimer in both oral and written testimony that the testimony is being offered for educational purposes only.

The 501(c)(3) may report the testimony and any responses in its regularly scheduled newsletter to members,¹²³ for example, but should take care that publicity efforts around its testimony do not themselves cross over into partisan activity. 501(c)(3) organizations cannot indicate support for or opposition to a candidate or party while providing testimony and cannot work with a candidate or party to jointly draft a party’s platform.

b. Federal Election Law

FECA treats a 501(c)(3)’s dealings with a political party regarding its platform in the same manner as it does a 501(c)(3) influencing a candidate’s issue positions. Any “contribution,” including a coordinated communication or the provision of non-public research with fair market value, to a political party, is unlawful for an incorporated 501(c)(3). Unincorporated groups may make contributions, although incorporated 501(c)(3) organizations cannot—due to the IRC.

F. BUSINESS ACTIVITIES

1. Lists

In conducting their operations, charities often accumulate lists of names, email addresses, and other identifying information about individuals, such as donors, activists, volunteers, members, clients and patients. These lists are an intellectual property asset of the organization and can be highly valuable to other organizations—including political parties and candidates. In general, organizations may sell, trade, share and rent their lists, or obtain lists from other organizations; commercial list brokers help facilitate such transactions.¹²⁴

The quality of a list—which depends on factors such as what information is included and how current that information is—affects the list’s value as an outreach and organizing tool. Cleaning up or comparing a list to the voter file, or adding more descriptive information to a list (e.g., age, income, voting propensity, and consumer preferences), is sometimes referred to as “list enhancement” and, if done properly, results in a more effective database to further the charity’s work.

a. Federal Tax Law

Maintaining and using lists in fundraising, educational outreach, organizing, and lobbying are normal activities for most 501(c)(3) organizations, and the lists themselves are just another asset of the charity that must be used in furtherance of its charitable purposes. Issues involving the prohibition on supporting or opposing candidates arise when lists are used for partisan purposes by the organization, or when the organization rents or buys lists from partisan groups, rents or buys lists that include partisan information, or when the organization is approached by partisan groups for access to its lists.

A public charity may not provide its list(s) for free to candidates, political parties, or even a 501(c)(4) organization. If a charity makes a list available for rent at fair market value through a list broker or on some other arm’s-length basis to all comers, then the charity is not prohibited from making its list available on the same basis to candidates or political parties. A 501(c)(3) may not allow a candidate or political party to use its lists, even with fair compensation, unless the charity also is willing to make its lists available to all candidates in a race and all political parties. As an added precaution, a charity should specifically notify opposing candidates in a race that its list is available before allowing any one candidate access, even at market rates. Income from list rentals to candidates or political parties should be treated as unrelated business income (unless an exception is available).

As described in *The Connection*, “A 501(c)(3) may also **exchange** its list for an equivalent number of new names of equal value to be provided by the 501(c)(4) or 527 within a reasonable period of time, provided that the 501(c)(4) or 527 agrees to pay the fair market value of the list if it is unable to provide the new names to the 501(c)(3) within the agreed period.”¹²⁵

While a charity may rent, purchase, or receive as a gift a list from a party or candidate, it cannot use the list for partisan purposes, it must not pay more than fair market value for the list, and it must have a charitable use for the list. There should be no expectation that the 501(c)(3) will use the list to further the partisan interests of the party or candidate. For instance, a 501(c)(3) should exercise extreme caution if offered a list by a party or candidate on the understanding that it will conduct voter registration activities in particular neighborhoods—even more so if the charity knows that doing so will allow the candidate to focus her resources elsewhere.

Public charities should avoid including partisan information (such as party registration) in their lists. Including voter-related (such as voting frequency) information in a charity’s lists by itself is not a problem so long as the charity does not use the lists for supporting or opposing candidates. However, since the presence of such information on a charity’s lists may raise questions about its use, charities should document in their files how collecting the voter-related information furthered the charity’s mission. For example, a group trying to turn out the vote in the primaries may find it useful to be able to identify individuals as Republicans or Democrats so it can contact individuals to turn out in both respective primaries.

Third-party list enhancement services, often run by other 501(c)(3) or 501(c)(4) nonprofit organizations, may involve a charity providing its list to the service and receiving an enhanced list in return. Various services operate differently. As an example, The League of Conservation Voters Education Fund’s (LCVEF) list enhancement service “pools

A public charity may not provide its list(s) for free to candidates, political parties, or even a 501(c)(4) organization.

The FEC regulates a group's rental or sale of a list the same as it does any other thing of value: whether or not a transaction entails a contribution to the political group that receives the list depends upon whether or not the transaction was for fair market value.

together the membership lists of coalitions of environmental organizations. The lists are then merged, duplicate names removed, and each entry is enhanced with voter frequency data, county, voting precinct, state and federal legislative districts, age and gender, and other publicly available demographic and geographic information.”¹²⁶ As part of the deal, the list enhancement service may get to keep information from the charity's list, such as addresses or voting frequency. With appropriate review and caution, 501(c)(3) organizations may participate in list enhancement services like LCVEF's, where the service is not part of a 527 partisan entity, and the terms of the arrangement are on par with arm's-length, market transactions; this may be true even where the list enhancement service may later use information taken from the charity's list for its own partisan purposes. For example, a 501(c)(4) organization that runs a list enhancement service should be able to use information generated from a participating 501(c)(3)'s list to encourage support for a particular candidate. This presumes, of course, that the charity has a charitable purpose in participating in the list enhancement transaction, that it received fair consideration in return for its participation, and that it did not participate in order to make its lists available for partisan use.

b. Federal Election Law

The FEC regulates a group's rental or sale of a list the same as it does any other thing of value: whether or not a transaction entails a contribution to the political group that receives the list depends upon whether or not the transaction was for fair market value. Notably, the FEC has determined that an arm's-length exchange of lists of equal market value entails no contribution either way and, in fact, requires no reporting to the FEC.¹²⁷

2. Commercial Transactions

501(c)(3) organizations often generate revenue by selling or leasing their goods, services or facilities to the public, or engaging in other types of commercial transactions. For instance, a church might rent its building to private parties for special events, or a charity might provide fee-based consulting services or accept paid advertising in one of its publications. As explained in the section above, an organization also may sell or rent its mailing list, or enhance other parties' mailing lists, for a fee. A Section 501(c)(3) organization must pay particular attention, however, if the commercial transaction involves a partisan organization on the other side.

a. Federal Tax Law

If a 501(c) organization enters into a commercial transaction, and the other party happens to be a political candidate, committee, party or other 527 tax-exempt political organization, or another organization that is operating for partisan purposes (which may include a 501(c)(4) organization), then the transaction itself may constitute support or opposition for a candidate.

The factors that the IRS will consider in determining whether an organization has supported or opposed a candidate include:¹²⁸

- “Whether the good, service or facility is available to all candidates in the same election on an equal basis,
- Whether the good, service, or facility is available only to candidates and not to the general public,
- Whether the fees charged to candidates are at the organization's customary and usual rates, and
- Whether the activity is an ongoing activity of the organization or whether it is conducted only for a particular candidate.”

If a 501(c)(3) organization is willing to enter into a transaction, such as selling or renting of mailing lists, the leasing of office space, or the acceptance of paid political advertising, with any person that agrees to nonpartisan terms (including on a first come, first served basis) and make its services or facilities available to anyone along the political spectrum, offering the same terms and charging a comparable market rate fee to each, then the transaction should not constitute candidate support or opposition. This is true even if the purchaser or lessee is a political party or another entity that will use the resource for partisan purposes. Any income from a commercial transaction involving a partisan group, however, may need to be treated as unrelated business income (unless an exception is available), since it would be difficult for an organization to justify the transaction as being related to its charitable purpose.

It is helpful if an organization has a track record of providing the resource in question to other members of the public before entering into a transaction with a candidate or political entity. This circumstance reduces the appearance that the organization may be trying to accommodate a political interest by entering into the transaction. Offering the transaction on the same terms to all candidates in a race before contracting with any one of them may also be a useful precaution.

b. Federal Election Law

FEC regulations address an incorporated nonprofit's provision of facilities or services to a candidate, political party, or other political committee by delineating the circumstances in which such transactions are exempt from the definition of a (usually prohibited) contribution.¹²⁹ Certainly, providing resources, such as a meeting room or equipment, for either no charge or less than fair market value, is an in-kind contribution.¹³⁰ By the same token, an arm's-length commercial transaction at fair market value is permissible because the 501(c)(3) acts like any other commercial vendor. In that situation, the political group must pay for its use of meeting or work space within a commercially reasonable time (generally, 30 days), but must pay in advance for catering or other food services.¹³¹

There is a special and somewhat more relaxed rule regarding meeting or event space if a 501(c)(3) ordinarily makes the space available to civic or community groups at reduced or no cost (subject to availability). In that event, the 501(c)(3) may do the same for candidates, political parties, and other political committees so long as any federal political entity, upon its request, may have similar access to the space on similar terms.¹³² Of course, the 501(c)(3) must comply with federal tax rules as well.

The fair market value principle that ordinarily governs a campaign's access to a 501(c)(3)'s goods, facilities, and services does not always operate in the same manner in reverse—that is, when the 501(c)(3) is purchasing from a campaign. If a campaign sells or rents furniture, equipment, or another item that it did not acquire or create in order to sell or rent for fundraising purposes—such as a computer that is no longer needed, and even a fundraising list itself (the names of people on the list were acquired in order to raise money from them, but the list itself was not created in order to sell it)—then a 501(c)(3) may purchase the item at its fair market value, and no contribution will result.¹³³ But when a campaign sells event tickets, clothing, or other items as part of its ordinary fundraising efforts, a 501(c)(3)'s payments for them are contributions, even if at fair market value or less.¹³⁴ Consequently, a 501(c)(3) cannot make such purchases or engage in such fundraising activities.

G. PERSONAL ACTIVITIES OF 501(c) STAFF, VOLUNTEERS AND BOARD MEMBERS

501(c)(3)s, like all organizations, are made up of people. Employees and volunteers of charities are often personally engaged in the political and democratic process in ways that are related to the charity's mission. Although the charity is prohibited by its tax-exempt status from engaging in partisan activity, individuals do not give up their basic First Amendment

It is helpful if an organization has a track record of providing the resource in question to other members of the public before entering into a transaction with a candidate or political entity.

rights of speech and association because they become affiliated with a charity. The question is, when is an individual representing a 501(c)(3), and when is he or she acting personally? Both the IRS and FEC regulations deal with this question and provide standards for making this distinction.

1. Federal Tax Law

The IRS will consider all facts and circumstances it deems relevant in determining whether actions of individuals associated with a 501(c)(3), such as its staff, directors, officers, volunteers or spokespersons, should be attributed to the organization itself, rather than treated as personal statements by individuals outside the scope of the campaign intervention prohibition. Nonetheless, there are some factors the charity can control to help avoid attribution.

First, a charity should not allow its assets or facilities to be used for individuals' personal election campaign work. This includes obvious things like letterhead, photocopiers and telephones, as well as perhaps less obvious ones like distribution lists, mailing permits, and email accounts. Staff time—time for which a charity compensates the individual—is the charity's resource, and should not be used for electioneering. Even unpaid time off could be problematic if permitted to staff outside of standard personnel policy limits and preferentially to allow them to volunteer on some campaigns and not others. However, if employees are generally permitted some *de minimis* personal use of office facilities, it may be possible to avoid having that personal use for candidate-related activities attributed to the employer charity.

Charity-sponsored events use the charity's reputation and goodwill, so charity representatives cannot support or oppose candidates at such events. Charities should also avoid reporting their supporters' personal electioneering activities in the charity's newsletter.

Second, 501(c)(3) organizations should make sure staff are aware, in writing, of policies against using organizational resources for supporting or opposing candidates. The personnel manual is an ideal place to do this. When dealing with the public on issues in an election, charity spokespersons should liberally include disclaimers, explaining that the charity cannot and does not endorse candidates. A website is another good place to post a disclaimer. While such disclaimers will not excuse campaign intervention, they can help explain a charity's public communications not intended to support or oppose candidate to those who might otherwise read campaign intervention into them. And when individuals are off the charity's clock, they should make clear that they are speaking for themselves and not for the organization.

As discussed in the Endorsements section above, the IRS has indicated that if a prominent individual makes a public statement (such as signing an open letter) in his or her personal capacity, but is identified by his or her position with the charity, then it is acceptable if the reference to the charity is qualified by a phrase such as "Organization stated for identification purposes only." For more information about the use of disclaimers, see Endorsements.

2. Federal Election Law

Generally under FECA, an individual who works for a 501(c)(3) may volunteer for any candidate, political party or other political committee on non-working time without that activity being attributed to the 501(c)(3), so long as the 501(c)(3) does not direct the activity or authorize the individual to act on its behalf. FECA generally recognizes that an "agent" relationship exists only if an individual has actual authority to act on behalf of a group.¹³⁵

For example, an individual officer, employee or other representative of a 501(c)(3) may endorse a candidate if he does so in his personal capacity and not as an agent of the group. The group cannot be involved in that personal conduct. An individual endorsement may be accomplished by the individual making the endorsement during non-working

501(c)(3) organizations should make sure staff are aware, in writing, of policies against using organizational resources for supporting or opposing candidates.

time, eschewing any indication of organizational responsibility, and, most prudently, affirmatively disclaiming any.¹³⁶ FECA treats uncompensated volunteer activities by employees of corporations, including nonprofits, as exceptions to the definition of an in-kind contribution.¹³⁷ That principle may be applied to unincorporated associations as well.

An employee may use paid vacation, sick or personal leave to volunteer for a partisan political activity, so long as the 501(c)(3) follows its regular paid-leave policies.¹³⁸ Such paid leave may include continued payment by the 501(c)(3) of its share of fringe benefit costs.

An employee also may use an unpaid leave of absence to work on a campaign. However, the 501(c)(3) may not pay the employer's share of fringe benefit costs during that leave unless the employer has a pre-existing policy of doing so for all unpaid leaves. Instead, the employee (or his union's federal PAC, subject to its \$5,000 per-candidate, per-election limit) must pay to maintain those benefits.¹³⁹ In contrast, the employee's service credit toward eligibility and benefits may continue to accumulate if that is consistent with the 501(c)(3)'s regular unpaid-leave policy.¹⁴⁰

FEC regulations also permit some minimal use of working time and workplace facilities for the volunteer political activities of a corporate employee, but the IRC makes such use potentially risky for a 501(c)(3). Under the FEC standard, an employee who is expected to work a particular number of hours in a given period may volunteer on working time if he or she makes up the time within a reasonable period.¹⁴¹ Also, an employee may make "occasional, isolated or incidental use" of an employer's facilities for such activities.¹⁴² This generally means spending no more than an hour a week or four hours a month on the activity, whether or not that is working time, and, if it is working time, nonetheless completing the normal amount of work that he or she carries out during that period.¹⁴³ A volunteer's use of the employer's facilities or equipment, such as a photocopier or telephones, must not increase the employer's operational costs, or, if it does, the employee must reimburse the employer for those costs.¹⁴⁴ More than isolated, incidental or occasional use requires employee reimbursement of the employer within a commercially reasonable time—ordinarily, 30 days—at the normal and usual charge for such facilities, that is, their fair market value.¹⁴⁵ Similar employee reimbursement is due for any use of facilities to produce campaign materials.¹⁴⁶

Federal tax and election law impose strict restrictions on donations of money or services to candidates, political parties, political committees and other organizations that engage in partisan activities.

H. INTERACTION WITH POLITICAL ENTITIES

1. Contributions (Cash and In-Kind)

Federal tax and election law impose strict restrictions on donations of money or services to candidates, political parties, political committees and other organizations that engage in partisan activities. Contributions include both money (including loans) and in-kind contributions of an organization's resources. These laws combine to preclude any 501(c)(3) organization from making a contribution of any kind to a partisan entity.

a. Federal Tax Law

501(c)(3) organizations may not contribute to candidates, candidate-related PACs, or political parties; pay to attend partisan political dinners and similar events (even if held by 501(c)(4)s); or make loans to political entities.

Other restrictions are less obvious. The IRS considers a 501(c)(3) to be making "in-kind contributions" when it provides anything of value—a mailing list, facilities, equipment, staff time or any other resource—to a candidate, party, or political organization without receiving fair market value in return.

A charity also may not expressly coordinate its activities with a political organization. If a charity conducts its programs in an election year so that its public events, staff work, voter education, or other activities happen to dovetail with a political campaign's or a party's work,

If a charitable organization makes any contribution to a noncharitable entity, such as a Section 501(c)(4), 501(c)(5), or 501(c)(6) organization, which is permitted to engage in a certain level of partisan activity, then the charity must restrict its contribution to charitable purposes.

then the IRS may conclude that the charity either (i) is operating impermissibly for the private benefit of the political organization, or (ii) is supporting a candidate as part of a unified effort to affect the election.

If a charitable organization makes any contribution to a noncharitable entity, such as a Section 501(c)(4), 501(c)(5), or 501(c)(6) organization, which is permitted to engage in a certain level of partisan activity, then the charity must restrict its contribution to charitable purposes. This is usually accomplished through a written grant agreement. Campaign intervention activity should also be explicitly prohibited. To enforce these restrictions, the charity should require regular reporting by the recipient on the use of the charity's contribution and should require the return of any contributed amount that is used for any other purpose.¹⁴⁷

As discussed in Chapter II above, 501(c)(3) organizations may contribute to initiatives and other ballot measure campaigns as long as they stay within their own lobbying limits.

b. Federal Election Law

As explained in Chapter IV above, FECA imposes strict limits on the sources and amounts of both monetary and in-kind (including "coordinated") contributions to federal candidates, political parties, and other federal political committees. FECA precludes any contribution by an incorporated 501(c)(3) and subjects an unincorporated 501(c)(3) to the limits applicable to individual contributors. Of course, all 501(c)(3) organizations must adhere to the IRC prohibition on such contributions.

2. Connection With a Section 527 Political Organization

The purpose of a Section 527 political organization is to influence the selection, nomination, election or appointment of individuals to federal, state or local elected office. If another organization, such as a corporation (whether for-profit or nonprofit) or a union, wishes to become more engaged in the political process, it may sponsor a 527 political organization in order to expand the range of partisan election-related activity that it may pursue. As described below, a 501(c)(3) organization may not sponsor a 527.

a. Federal Tax Law

The IRS does not allow a 501(c)(3) organization to operate, contribute to, or coordinate with a 527 political organization to support or oppose candidates, although individuals affiliated with the 501(c)(3) may do so privately, as discussed in Section G. As explained in Section F above, a 501(c)(3) cannot subsidize a 527 political organization by providing it with office space, personnel, mailing lists, or other resources for free or at a discount. A 501(c)(3) may engage in transactions with a political organization if it charges full fair market value for goods or services and regularly provides the goods or services to others, but only if nonpartisanship is still maintained, such as by offering transactions on the same terms to all candidates in a race. Any net income is treated as unrelated business taxable income. For more information about engaging in business transactions with political organizations, see Section F (2).

In addition, 501(c)(3) organizations engaged in nonpartisan election-protection efforts may communicate with political parties and candidates who are also concerned about voting system integrity. Although 501(c)(3) organizations need to be careful not to violate the ban on intervention in political campaigns when communicating with parties and candidates, not all such communications are prohibited. See Appendix B for guidelines on when it's OK for a 501(c)(3) voter-protection group to talk with a candidate or party—and when it's not.

b. Federal Election Law

It is lawful and common under FECA for a business or nonprofit corporation to sponsor and pay for a separate segregated political fund that is regulated as a federal PAC (often

referred to as a “connected PAC”).¹⁴⁸ The IRC, however, precludes a 501(c)(3) organization from doing so.

The FEC routinely has acknowledged that individual officers and staff of a 501(c)(3) or other nonprofit, if acting in their personal capacities, using their own and not the organization’s resources, and not acting as the organization’s agents, may themselves establish a “non-connected” federal PAC. It may be necessary that less than a majority of the PAC’s board also hold control-type positions with the 501(c)(3). The non-connected PAC may share office space and use the services of 501(c)(3) staff, so long as the PAC pays its respective appropriate share of the total costs incurred based on its actual use.¹⁴⁹

3. Campaign Trainings

Many 501(c)(3) organizations are devoted to educational activities, or use public education as a central means for achieving their goals. So it is not surprising that some 501(c)(3) organizations approach activists and voters from an educational perspective, creating programs to teach people the mechanics of registering to vote and voting, teach activists how to run campaigns and even how to run for office.

a. Federal Tax Law

501(c)(3) groups may sponsor programs to train voters, campaign workers, and candidates, so long as the programs are thoroughly nonpartisan in their recruitment of instructors and students, curriculum, placement of graduates, and all other aspects of operation. In *American Campaign Academy*,¹⁵⁰ the IRS revoked an organization’s exempt status because the campaign school was established by and for Republicans and provided an “improper private benefit” to the Republican Party. Interestingly, the IRS did not find that campaign intervention had occurred, but instead looked to the benefits lopsidedly accruing to private political interests as the basis for revocation.

Campaign training programs should be open and widely publicized to the general public. A 501(c)(3) may target programs at certain groups that have been (and continue to be) under-represented in the political life of our country, such as low-income voters, racial or ethnic minorities, disabled people, and (at least for now) women, following the same principles the IRS applies for voter registration and GOTV campaigns. See Section D, Voter Registration and Get-Out-The-Vote (GOTV). However, a 501(c)(3) should not refuse to train activists based on their political party or views on issues. Training potential future candidates on how to get elected must stop before it crosses over into helping a specific candidate in his or her campaign.

b. Federal Election Law

A 501(c)(3) organization may sponsor and pay for scholarship and internship programs with congressional offices so long as the individuals do not engage in federal election activities.¹⁵¹ An old pre-BCRA FEC advisory opinion also approved the placement of interns (on a nonpartisan basis) at national party committees so long as “no substantial portion” of their activities concerned federal election campaigns,¹⁵² but this opinion is likely superseded by BCRA’s prohibition of non-federal contributions to those committees.¹⁵³

Neither FECA nor the FEC’s regulations address the circumstance of an organization providing general political training for activists or actual or prospective campaign workers. Nonetheless, it is likely that a formal program to train individuals for a particular campaign, political party or political committee would be viewed as an in-kind “contribution” to that committee if it has an ascertainable fair market value. In contrast, general sponsorship of campaign skills trainings that are provided without regard to the partisan preferences of participants is more likely to be deemed exempt because it is not undertaken “for the purpose of influencing” or “in connection with” a federal election.¹⁵⁴

501(c)(3) groups may sponsor programs to train voters, campaign workers, and candidates, so long as the programs are thoroughly nonpartisan in their recruitment of instructors and students, curriculum, placement of graduates, and all other aspects of operation.

The FEC has also endorsed a 501(c)(3)'s production of videotapes featuring members of Congress that discuss the operation of Congress and issues before it, but contain no electoral or party references.¹⁵⁵

See Section D with respect to efforts to educate the public regarding voter registration and get-out-the-vote activities.

I. SPECIAL TYPES OF ELECTIONS; APPOINTMENTS TO PUBLIC OFFICE

1. Nonpartisan Elections

Not all elections for public office involve competing political parties. A nonpartisan election is one that is for an office, such as a judicial or school board seat, in which no candidate may run under a party affiliation.

a. Federal Tax Law

The IRS definition of a “public office” exceeds the scope of federal and many state election laws. It includes any position filled by a vote of the people at the national, state, or local level, elective party offices (such as state party chair) and so-called nonpartisan offices, described above.¹⁵⁶ Therefore, 501(c)(3) organizations cannot support or oppose a candidate for any public office, even in a nonpartisan race. 501(c)(3) organizations also cannot support or oppose a candidate in any single-party primary or caucus.

b. Federal Election Law

There is no such thing as a “nonpartisan” federal election. Even where state law precludes party primaries and instead conducts an all-candidate election and then, if necessary, a runoff election, each vote is still an “election” within the meaning of FECA and is subject to all of the FECA rules.¹⁵⁷ Similarly, an entirely uncontested election where only one party qualifies a candidate for the ballot is subject to all of the FECA rules, again because it is an “election.”

2. Ballot Measures

Twenty-seven states and the District of Columbia permit individuals to petition for or require popular votes in some circumstances on state constitutional amendments, legislation, state financing of special projects and other policy matters.¹⁵⁸ Many counties and municipalities also conduct ballot measure elections. Ballot measures usually are voted on at the same time as candidate elections, and ballot issues and candidate campaigns can become intertwined in public debates.

While 501(c)(3) and other tax-exempt organizations can participate in ballot measure campaigns, state law may require that they register and report to the state as political committees.¹⁵⁹ Generally, states want to know about money raised and spent to influence ballot measures, but do not limit such activity. The IRC treats work supporting or opposing ballot measures as lobbying, which is permissible although limited for 501(c)(3) public charities. There are particular circumstances where FECA rules are implicated in what is ordinarily only a state-regulated matter.

When important issues of public policy will be decided by the voters on the ballot, charities' voices can be critical in informing the public about how the proposals will affect them. Charities can take positions on ballot measures, sponsor ballot measures, or form committees to spend money for or against measures on the ballot.

a. Federal Tax Law

As noted in Chapter II, federal tax law treats ballot measures as legislation for which the voting public acts as the legislature. Therefore, tax law allows charities to participate

When important issues of public policy will be decided by the voters on the ballot, charities' voices can be critical in informing the public about how the proposals will affect them.

in ballot measure activities as lobbying, and subject to the lobbying limits. For more information on the definition of lobbying and charitable lobbying limits, see *Being a Player, Seize the Initiative* and *Worry-Free Lobbying*.

However, charities may not use ballot measure lobbying activities as a cover for supporting or opposing candidates who may have sponsored or become closely associated with a measure. As stated many times in this publication, the IRS will consider all the facts and circumstances it deems relevant to whether a charity's ballot measure lobbying activities were also attempts to influence the outcome of a candidate election.

The situation is particularly difficult where the ballot measure process is being used by politicians primarily as an electoral tool. For example, a measure may be placed on the ballot with no realistic hope of passage in order to activate particular segments of voters who care about that issue and who will presumably also vote in candidate races appearing on the same ballot. Ballot measures have also been used to suppress turnout to affect candidate elections. A measure could also be used to attract contributions from the segment of voters passionate on a particular issue, diverting their funds from the candidates who would otherwise expect to receive the support.

But, with care, 501(c)(3)s can lobby without electioneering even where a candidate has become closely associated with the measure (such as by endorsing the ballot measure), or where the measure is being used by partisan interests for partisan ends. The key is staying focused on the policy issues raised by the ballot measure, and steering clear of the candidate or party aspects, avoiding any mention of any candidate's or party's positions, and not collaborating with partisan interests on its ballot measure work. For example, as discussed above, trying to turn out the environmental vote risks becoming electioneering where the candidates are perceived as differing importantly in their stances on the environment, so that pro-environment voters will likely vote for the more environmentally friendly candidate. But if there is an environmental measure on the ballot, an environmental group should be able to turn out the environmental voters as a lobbying matter, to support or oppose the legislation, independent of any candidate effects, so long as its program is carefully nonpartisan. This is a good example of a situation in which a 501(c)(3) should seek legal counsel before proceeding, due to the fact-specific nature of the work.

b. Federal Election Law

The ballot measure itself, as a purely state and local device, is not directly regulated by FECA. However, if a federal candidate or a political party has “directly or indirectly establish[ed], finance[d], maintain[ed], or control[led]” a ballot measure committee, then the committee may be treated as his, her, or its legal alter ego. In that case, a 501(c)(3)'s dealings with that committee will be subject to all of the constraints and considerations applicable to dealing with the candidate or party involved.¹⁶⁰ Accordingly, it is important that a 501(c)(3) determine the nature and extent of any involvement in a ballot measure committee by a federal candidate or officeholder or a political party.

3. Appointment to Executive and Judicial Offices

At the federal level and in virtually all states, elected officials have the authority to appoint individuals to serve in senior executive and judicial positions, often subject to a legislative confirmation vote. Because a candidate for a public office is involved—some candidates for public office are appointed, not elected—many charities may be concerned that advocacy for or against such a nomination could violate the prohibition on intervening in an election to public office, or be regulated like a federal election. It is not. At the federal level, a 501(c)(3) that seeks to influence these processes must be mindful of the constraints imposed by the IRC and disclosure requirements under the federal Lobbying Disclosure Act.

Charities may not use ballot measure lobbying activities as a cover for supporting or opposing candidates who may have sponsored or become closely associated with a measure.

FECA does not regulate any aspect of the appointment, confirmation or selection of federal non-elected officials, such as Cabinet and sub-Cabinet positions and federal judges, because these are not federal elections.

a. Federal Tax Law

During the intense activity surrounding the Robert Bork’s nomination to the U.S. Supreme Court in 1987, the IRS addressed the tax consequences of seeking to influence the Senate confirmation of an individual nominated by the president to serve as a federal judge. The Service explicitly declared that confirmation hearings were to be treated as attempts to influence legislation, since the process culminated in a legislative vote on the nominee.¹⁶¹ Appointments to executive or judicial offices therefore do not fall under the campaign intervention prohibition because they do not involve an elective public office.

In late July 2005, presumably in response to the news that Justice Sandra Day O’Connor was going to resign, creating an opening on the Supreme Court and the prospect of a nomination by the President that would require Senate approval, the IRS posted a statement on its website entitled “Attempts to Influence Judicial Appointments by Exempt Organizations.”¹⁶² The statement summarized the proper tax treatment of such activities by Section 501(c)(3) organizations, as well as Section 501(c)(4), 501(c)(5), and 501(c)(6) organizations and Section 527 political organizations. In discussing charities, the statement said that “[l]imited lobbying to influence Senate confirmation of judicial appointments is permitted... Attempts to influence Senate confirmation of a federal judicial appointment are not considered campaign intervention, which is specifically forbidden by section 501(c)(3).”

While influencing executive and judicial appointments is not prohibited by Section 501(c)(3), IRC Section 527, which governs political organizations, includes appointments of individuals to public office within its definition of political activity. This could lead to the strange result that a Section 501(c)(3) organization, while not violating its tax-exempt status, would still be subject to tax under Section 527(f) on its expenditures attempting to influence an appointment.¹⁶³ However, the IRS statement described above addressing the tax implications of judicial appointments makes no reference to the possibility of any tax under Section 527(f) on 501(c)(3) organizations engaging in these activities. If the IRS were to decide that lobbying on appointments is to be treated as a Section 527 political expenditure, it is expected that the IRS would apply the Section 527 tax to lobbying on appointments on a prospective basis only.

b. Federal Election Law

FECA does not regulate any aspect of the appointment, confirmation or selection of federal non-elected officials, such as Cabinet and sub-Cabinet positions and federal judges, because these are not federal elections.¹⁶⁴

4. Recall, Expulsion and Impeachment of Elected Officials

The president and vice president are subject to removal from office by impeachment by the House of Representatives and conviction by the Senate. A U.S. senator or representative may be expelled by a vote of his or her respective body. State and local elected officials may be subject to a recall vote—a special election on the question of whether an elected official should be removed from office—although no such procedures exists for any federal officeholder.

a. Federal Tax Law

Although no IRS precedent directly on point exists on the question, calling for the impeachment or resignation of an elected public official is probably permissible under section 501(c)(3) of the Internal Revenue Code. In the case of impeachment, since a vote of a legislative body is required, the activity (if permitted) would count as lobbying, subject to the 501(c)(3) organization’s lobbying limits. Of course, organizations cannot comment on who should be elected to succeed the ousted official.

Recalls, which take the form of a ballot question in many jurisdictions, usually ask whether a public official should be removed from office and if so, who should be elected to serve the remainder of the term. While the IRS has issued no guidance on recall elections, it is likely that, especially where the recall vote also functions to elect a replacement, charities cannot campaign substantively on either question.

In light of the lack of guidance, organizations should consult with legal counsel before engaging in any specific recall or impeachment activities.

b. Federal Election Law

FECA does not apply to any means of premature removal of a federal elected official because none constitutes an “election” so as to trigger application of the statute. The United States Constitution limits the means of premature removal of an elected official to impeachment and conviction of the president and vice president and expulsion by a House of Congress of one of its members. There is no such thing as a recall election at the federal level.¹⁶⁵

In contrast, many states’ laws do provide for impeachment, expulsion or recall of their own elected officials, and may regulate related activities, whether conducted by a nonprofit or otherwise.

J. FUNDRAISING

1. Fundraising for the 501(c)(3) Organization

Fundraising materials can, and should, be important vehicle for a 501(c)(3) organization to promote its advocacy efforts. However, prior to raising money that is specifically designated for use in, or in connection with, a lobbying or ballot measure effort (which is sometimes referred to as “earmarking”), the organization should consider both the IRS rules regulating this activity as well as state ethics and campaign finance rules.¹⁶⁶ While fundraising for advocacy is critical for achieving the organization’s mission, organizations must exercise caution when doing so.

In addition, charities may use politicians to raise funds on their behalf, as long as it is clear that any donation is strictly dedicated to the charity’s purposes and the officeholders or candidates comply with special rules under FECA or state election law.

a. Federal Tax Law

Problems under federal tax law can arise if fundraising activity benefits any politician, even in exchange for his or her assistance in solicitations, or if charitable funds are used to benefit one political party or candidate.¹⁶⁷ The fundraising solicitations in themselves also can constitute campaign intervention if they show a preference for a particular candidate.¹⁶⁸

An IRS ruling in 2000 involved a fine imposed on what is thought to be The Heritage Foundation, a 501(c)(3) organization, for allowing a presidential candidate (thought to be Bob Dole), to sign a widely distributed fundraising letter for the Foundation that recited much of Dole’s campaign platform as the organization’s agenda. The letter made no reference to Dole’s status as a candidate or the upcoming election, and the mailings raised substantial donations to the Foundation. Nevertheless, the IRS found that Heritage’s mailing helped Dole’s campaign.¹⁶⁹ More recently, however, the IRS did allow charitable fundraising letters to be sent by a charity and signed by incumbent candidates, so long as the letters were not mailed into the jurisdiction in which the incumbent would seek re-election.¹⁷⁰

It is not just what a charity does that can get it in trouble, but also how it talks about what it does: framing accomplishments as political victories can taint otherwise nonpartisan efforts. For instance, one charity that claimed in fundraising appeals that its “nonpartisan” voter registration programs had effectively influenced the election or defeat of candidates

It is not just what a charity does that can get it in trouble, but also how it talks about what it does: framing accomplishments as political victories can taint otherwise nonpartisan efforts.

501(c)(3) organizations should generally avoid sponsoring joint fundraising events or solicitations with candidates or political groups, although with care a 501(c)(3) and a 501(c)(4) may engage in a joint solicitation in some circumstances.

based on their ideology was subject to penalty taxes by the IRS.¹⁷¹ A charity therefore should never suggest to potential donors that their contributions will help or have helped defeat or elect a candidate.

501(c)(3) organizations should generally avoid sponsoring joint fundraising events or solicitations with candidates or political groups, although with care a 501(c)(3) and a 501(c)(4) may engage in a joint solicitation in some circumstances. As described in *The Connection*: “a 501(c)(4) soliciting funds expressly for political activities or its PAC generally should not do so in a communication that also requests funds for a 501(c)(3). The IRS has said that any joint fundraising will be carefully scrutinized to determine whether the 501(c)(3) is allowing its name or goodwill to be used to further an activity the 501(c)(3) is prohibited from conducting.”

If a politician is soliciting funds for a 501(c)(3), then the organization must take extra care to ensure that donors understand that contributions will not be used for supporting or opposing candidates. Even if a 501(c)(3) could engage in campaign intervention, contributions specifically directed to be used for electioneering purposes would not be tax-deductible by a donor. A 501(c)(3) that encouraged donors to make tax-deductible contributions in support of an effort to support or oppose a candidate, could be accused by the IRS of “aiding and abetting” its supporters to cheat on their taxes, as well as violating its own tax-exempt status.

b. Federal Election Law

FECA does not directly regulate how a 501(c)(3) engages in fundraising for itself. In contrast, FECA does specify how federal candidates and officeholders and political party committees may donate or solicit donations to 501(c)(3)s and other tax-exempt organizations. Under those rules:

- A national political party committee may solicit for or donate to any tax-exempt organization unless the organization spends money in connection with a federal election, even in a nonpartisan manner, particularly if it undertakes voter registration within 120 days of an election or any GOTV activity. The scope of an organization’s election-related activities that precludes a political party’s assistance is not well-defined, but an organization may provide a written certification that it does not engage in such activity upon which the party ordinarily may rely.¹⁷²
- A federal officeholder or candidate may donate campaign funds without limit to a 501(c)(3) group that does not engage in voter registration or GOTV activity.¹⁷³
- A federal officeholder or candidate may make a general solicitation of funds in any amount from any source for a 501(c)(3) or other tax-exempt group whose principal purpose is something other than voter registration or GOTV.¹⁷⁴
- A federal officeholder or candidate may solicit up to \$20,000 from individuals for either a tax-exempt group whose principal purpose is voter registration or GOTV or for any tax-exempt group’s voter registration or GOTV activities.¹⁷⁵ The solicitor ordinarily may rely on a group’s written certification about its principal purpose or activities.¹⁷⁶
- A federal officeholder or candidate may donate personal funds without limit to a tax-exempt group.¹⁷⁷
- A state, local or district party committee operates under the same funding and solicitation constraints regarding tax-exempt groups as does a national party committee,¹⁷⁸ and it may be subject to additional state-law rules.

A 501(c)(3) also may be the beneficiary of a corporate or union program that makes matching contributions to the 501(c)(3) when restricted class members contribute to the

corporation's or union's PAC. This is permissible even though the PAC sponsor is making its charitable donations as an incentive to generate contributions to the PAC. The FEC has approved numerous such plans, and while they have typically involved the restricted-class member choosing the 501(c)(3) recipient rather than the PAC or its sponsor doing so,¹⁷⁹ the FEC has specifically endorsed such a program where the PAC alone could choose the recipient charity.¹⁸⁰

The FEC has also endorsed other federal PAC and commercial fundraising ventures that have designated a 501(c)(3) as an alternative recipient to a PAC in the event a particular contingency did not occur by a certain date. Such contingencies include, for example, contributions to a federal PAC earmarked for potential presidential candidates if they became actual candidates;¹⁸¹ contributions to a federal PAC earmarked for whoever became the presumptive pre-convention presidential nominee of a particular party;¹⁸² and contributions to federal candidates who pledge to support particular policies.¹⁸³

2. Fundraising for Political Recipients

Public officials often help raise money for 501(c)(3) organizations, using their office and goodwill to benefit charity (and perhaps burnish their own reputations for being good citizens at the same time). Sometimes, a charity may be asked, or may wish, to use its influence and goodwill to return the favor, either by actively soliciting its donor or activist lists for political contributions to a candidate's campaign, or allowing a politician to take advantage of an event conducted by the charity to ask for money for the politician's campaign.

a. Federal Tax Law

A 501(c)(3) organization may not solicit financial or other forms of support for candidates or political organizations. It also should not allow candidates or political organizations to fundraise at any organization event. Any coordination with or accommodation of a candidate or political organization for such activities by a 501(c)(3) charity is likely to violate the campaign intervention prohibition.

b. Federal Election Law

FEC regulations prohibit nonprofit corporations from "facilitating" contributions to federal candidates, political parties, or other federal political committees. Unincorporated nonprofits are restricted at least by the express advocacy prohibition and by contribution limits from engaging in facilitation. "Facilitation" includes any uncompensated use of a group's resources to solicit contributions or to enable a political entity to do so. Examples include directing staff to carry out fundraising activities and providing facilities for candidates to hold their own fundraising events.¹⁸⁴ Additionally, corporations may not solicit contributions for any federal political recipient;¹⁸⁵ and, regardless of its corporate or non-corporate form, a 501(c)(3) may not do this due to the IRC alone.

3. Employee Payroll-Deducted PAC Contributions

Many employers, including 501(c)(3)s and other nonprofits, are parties to collective bargaining agreements with unions representing their employees. Most unions sponsor connected federal PACs to which their members may contribute. A common means for members to contribute is by payroll deduction. The question then arises whether a 501(c)(3) employer may administer a payroll deduction program on behalf of its employees to enable them to make federal contributions.

a. Federal Tax Law

If an organization chooses to implement a payroll deduction program, any recipient PAC must be of the employee's own choosing without any selection or endorsement by the employer. The IRS has ruled in one private letter ruling to a 501(c)(3) corporate parent of

Public officials often help raise money for 501(c)(3) organizations, using their office and goodwill to benefit charity (and perhaps burnish their own reputations for being good citizens at the same time). Sometimes, a charity may be asked to return the favor.

Outside of the collective bargaining context, a 501(c)(3) also may establish and pay the administrative costs of an “employee participation plan” under which any employee may establish an individual political account via payroll deduction.

health services providers that all expenditures for its administration of a payroll deduction plan were in fact political expenditures and subject to excise tax, because contributions via the plan could only be made to one PAC, which was sponsored by a health care industry 501(c)(6) trade association and was implicitly endorsed by the 501(c)(3)’s charity officials.¹⁸⁶

In contrast, the IRS issued a private letter ruling that advised a 501(c)(3) health care plan that its administration of a payroll-deduction plan through which its unionized employees could contribute to their union’s PAC did not constitute campaign intervention and would not adversely affect the plan or its managers. The union had sought the payroll deduction arrangement in collective bargaining and chosen the PAC, the employees contributed voluntarily to the PAC, and the health plan provided no material assistance to the PAC, which paid the health plan’s administrative costs related to the payroll deduction plan.¹⁸⁷

Each situation involving PAC payroll deductions by a 501(c)(3) is subject to its own facts and circumstances analysis. If the IRS determines that a charity representative has endorsed a specific PAC in any official capacity, or that any of the organization’s financial resources, facilities, or personnel have been used to support a particular PAC, then the IRS may conclude that the entire payroll deduction program constitutes prohibited support for a candidate.

The IRS has not released formal guidance on how to properly conduct a nonpartisan payroll deduction program for donations to political organizations. As a result, a 501(c)(3) organization should not implement such a plan without the advice of legal counsel.

b. Federal Election Law

A nonprofit corporation may sponsor and solicit from its restricted class contributions to the corporation’s federal PAC under FECA,¹⁸⁸ although the IRC forecloses that option to a 501(c)(3).

However, a 501(c)(3) may, in negotiations with a union representing its employees, agree to establish a payroll deduction plan for the union’s members whom it employs to contribute to their union’s federal PAC.¹⁸⁹ The union alone must solicit its members to participate, with the 501(c)(3)’s role confined to payroll administration and remittance of the contributions it deducts to either the union or the PAC.¹⁹⁰ The union or the PAC must reimburse the 501(c)(3) for its costs of administering the deduction. The 501(c)(3) and the union may agree that those costs have been factored into the overall contractual economic package, obviating the need for ongoing union payments to reimburse the 501(c)(3) for them.¹⁹¹ If such accord is reached, then it should be specified in the collective bargaining agreement.

Outside of the collective bargaining context, a 501(c)(3) also may establish and pay the administrative costs of an “employee participation plan” under which any employee may establish an individual political account via payroll deduction. The employees alone must control disbursements from their accounts, with the 501(c)(3) playing an entirely ministerial role and retaining an independent administrator for these accounts who does not inform the 501(c)(3) how the employees are using them.¹⁹²

These FEC rules effectively compel a 501(c)(3) employer to operate in a manner consistent with its tax-exempt status.

CHAPTER VI:

Enforcement

A. INTRODUCTION

Nonprofit organizations often find themselves on the receiving end of complaints filed with the FEC or the IRS, usually at the behest of individuals and groups that consider their targets to be political or ideological adversaries. Often, complaints also are filed by “watchdog” groups that are dedicated to policing compliance with the law and/or to advancing legal theories to expand the reach of the law. A nonprofit organization that itself wishes to lodge a complaint about another group would be well-advised to ensure that its own house is in order. Both IRS and FEC enforcement proceedings can be very expensive to defend, even if they arise from a meritless complaint.

This section provides a summary of the enforcement processes at the IRS and the FEC.

B. THE IRS ENFORCES THE 501(c)(3) POLITICAL PROHIBITION

During the 2004 presidential election, the IRS created an entirely new enforcement mechanism for the electioneering prohibition. While the IRS was initially criticized by nonprofit sector for the unexpected and unpublicized manner in which the enforcement program was implemented, it has since updated the program, which it now calls its Political Activity Compliance Initiative (“PACI”), published guidance about it and used it again in 2006, 2008 and 2010. Such enforcement is likely to be a standard feature of election years. The PACI program is intended to promote compliance by reviewing and addressing allegations of political intervention in real time, while violations are occurring and corrections can still be made.

The IRS has released useful guidance summarizing its interpretation of the campaign intervention prohibition and including detailed examples in a variety of fact situations.¹⁹³ Revenue Ruling 2007-41 is available on the IRS website, www.irs.gov, along with other information for charities about the prohibition against supporting or opposing candidates for public office. While continuing to expand these educational efforts, the IRS also has announced that it will step up enforcement in future election cycles in an effort to end violations. There is speculation that, now that the charitable sector is on notice, the IRS will be less hesitant to use more draconian sanctions available to it when it does find charities supporting or opposing candidates for public office.

If you believe that a 501(c)(3) charity has violated the prohibition on intervening in an election of a candidate for public office, you may file a complaint with the Exempt Organizations Examination Division of the IRS, at the following address:

IRS EO Classification
Mail Code 4910
1100 Commerce Street
Dallas, TX 75242

You may also use Form 13909, *Tax-Exempt Organization Complaint (Referral) Form*, for this purpose. The complaint should contain all relevant facts concerning the alleged violation of tax law.

The IRS cannot advise you of any action it has taken or may take in response to a complaint. The confidentiality and disclosure provisions of the Internal Revenue Code preclude the IRS from discussing matters relating to any activity it might undertake regarding the tax-exempt status of an entity with anyone other than the principal officers or authorized representatives of that entity.

A nonprofit organization that itself wishes to lodge a complaint about another group would be well-advised to ensure that its own house is in order.

C. THE FEC ENFORCES THE FEDERAL ELECTION LAW

The FEC has formal and longstanding procedures for considering and disposing of complaints alleging violations of its law, FECA. There are four potential stages of an FEC enforcement case (termed a “Matter Under Review,” or “MUR”).¹⁹⁴

First, a complaint may be filed by anyone with the FEC, whether or not the alleged unlawful conduct affected the complainant. Complaints must be sent to: General Counsel, Federal Election Commission, 999 E Street, NW, Washington, DC 20463, and should state that they are being made under 2 U.S.C. § 437g. The complaint must be sworn and allege facts, and it may include supporting documentation. The FEC Office of General Counsel (OGC) then sends a copy of the complaint to the alleged violator and anyone else that OGC believes the complaint indicates is a possible violator. These “respondents” have 15 days to explain in writing why the complaint should be dismissed.¹⁹⁵

Second, the FEC decides whether or not there is “**reason to believe**” that a violation occurred. The FEC treats this decision as finding “evidence... at least sufficient to warrant conducting an investigation.”¹⁹⁶ If not, the FEC will close the case. But if it does find reason to believe, then the FEC will commence an **investigation**, conducted by OGC, which may include subpoenas for documents, sworn answers to written questions and live questioning of witnesses taken under oath (depositions). A respondent has no comparable fact-gathering powers during an investigation.¹⁹⁷

Third, when the investigation ends, OGC may, but does not have to, try to settle, or “**conciliate**,” the MUR with a respondent. If there is no settlement, then OGC recommends to the FEC whether or not it should find “**probable cause**” that a violation occurred. The respondent has 15 days to respond in writing to an unfavorable recommendation, and in some cases it is permitted to argue the matter before the Commission in person (usually through counsel). If the FEC finds no probable cause, then the case is closed. If the FEC does find probable cause, then it either may close the case anyway or it must enter into a conciliation effort, even if there was a conciliation effort prior to the probable-cause finding.¹⁹⁸

Finally, if conciliation is successful, the case is closed on the basis of the conciliation agreement, including any penalties and corrective action it specifies. If conciliation fails, the FEC may either close the case anyway or initiate a **civil lawsuit** in federal court. If the FEC sues, it bears the burden of proving its case, which proceeds according to the usual rules of federal civil litigation.¹⁹⁹

Importantly, from the time the original complaint is filed with the FEC until the case finally ends before the FEC, the entire administrative proceeding is confidential unless the respondent waives confidentiality. When a case concludes, the FEC can release publicly only the principal argumentative pleadings and the conciliation agreement, if any, but not the underlying evidence and other materials in its case file.²⁰⁰

D. STATE ELECTION AUTHORITIES ENFORCE STATE AND LOCAL ELECTION LAWS

Procedures for filing complaints with state and local election authorities vary widely. Check with the appropriate state agency to obtain information on these procedures.

Importantly, from the time the original complaint is filed with the FEC until the case finally ends before the FEC, the entire administrative proceeding is confidential unless the respondent waives confidentiality.

APPENDIX A:

Factors Determining Whether a Communication is Political for 501(c) Organizations Other than 501(c)(3)

According to Revenue Ruling 2004-6, negative factors tending to show that an “advocacy communication on a public policy issue” is political, include, but are not limited to, the following six:

1. The communication identifies a candidate for public office;
2. The timing of the communication coincides with an electoral campaign;
3. The communication targets voters in a particular election;
4. The communication identifies that candidate’s position on the public policy issue that is the subject of the communication;
5. 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
6. The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Positive factors cited in the Ruling tending to show that the communication is not political, include but are not limited to the following five:

1. The absence of any one or more of the six negative factors above;
2. The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
3. The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or hearing;
4. The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the with specific event; and
5. The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

APPENDIX B:

Permissible Nonpartisan 501(c)(3) and Partisan Campaign Contact on Voter Engagement/Protection Efforts

May 501(c)(3) organizations engaged in nonpartisan election-protection efforts communicate with political parties and candidates who are also concerned about voting system integrity—albeit from a more partisan perspective? Although 501(c)(3) organizations need to be careful not to violate the ban on supporting or opposing candidates for public office when communicating with parties and candidates, not all such communications are prohibited. Below are some guidelines for when it's OK for a 501(c)(3) voter-protection group to talk with a candidate or party—and when it's not.

A 501(c)(3) organization must follow federal tax and federal and state election laws when engaged in any activity relating to candidate campaigns or political parties. That includes a 501(c)(3)'s efforts to protect the exercise of the right to vote, including research, advocacy, activism and administrative actions and litigation to ensure (a) fair and lawful rules and procedures for individuals seeking to register and vote, and (b) appropriate, sufficient and fairly distributed governmental information, voting systems and other resources to enable individuals to do so. Under federal tax law, 501(c)(3) organizations (whether or not they are incorporated) are strictly forbidden from supporting or opposing any candidate for public office. This means, among other things, that they **may not** endorse candidates for public office, make campaign contributions (whether monetary or in-kind), or make expenditures on behalf of candidates, political parties, federal PACs or nonfederal 527 organizations.

Under federal election law, nonprofit corporations (including incorporated 501(c)(3) groups), business corporations and unions are prohibited from contributing (cash or in-kind) to federal candidates; and coordinating certain communications with a federal candidate or political party. And, state election law routinely imposes similar restrictions as to state and local candidate campaigns. Virtually any violation of federal or state election law likely would be inconsistent with 501(c)(3) status as well.

Under these rules, **501(c)(3) organizations may:**

- Provide publicly available information to all candidates or parties—either upon request or at the organization's initiative.
- Issue press releases or post information on their websites describing their nonpartisan voter outreach plans and strategies or concerns about voter intimidation or voting problems in particular districts.
- Share research on voter-protection problems or other issues of general concern, as long as it is made generally available to the public (e.g., posted on the 501(c)(3)'s website) **or** is offered to all candidates in a race or all viable political parties in a jurisdiction.
- Solicit support from all political parties or candidates for a particular office for the 501(c)(3)'s efforts to ensure a fair and effective voting system (e.g., asking all political parties to submit an amicus brief in support of the 501(c)(3)'s efforts).
- Support litigation brought by a party or candidate that, in the independent judgment of the 501(c)(3), furthers the security of the voting process. In doing so, though, the 501(c)(3) must avoid showing support for the party or candidate and should affirmatively state its neutrality.

501(c)(3) organizations may not:

- Explicitly or implicitly endorse any candidate or political party. Nothing should be said, done, or implied that suggests electoral favor or disfavor either for a specified candidate or political party, or for unnamed candidates or parties generally that subscribe to particular issue positions or have particular characteristics. For instance, 501(c)(3)s cannot suggest that any particular political party or candidate has a better or worse position on election-protection issues.

- Make any direct or indirect candidate, party, federal PAC or 527 contribution. A 501(c)(3) should not conduct research on an issue in order to provide it to a particular candidate or party or at the request of a particular candidate or party. In addition, it cannot use any of its resources to pay for or participate in a partisan event.
- Target election-protection efforts to a precinct based on the political party or candidate the precinct is likely to support.
- Consult with a particular party or candidate to determine where to target election-protection efforts.
- Coordinate voter outreach efforts with candidates, parties, federal PACs or other 527 groups, even if the 501(c)(3) itself otherwise follows nonpartisan guidelines. Public charities cannot tailor their efforts to mesh with those of partisan entities or share voter outreach strategies with one candidate or party only.

Even if these standards are satisfied, other groups or the media may raise questions about any 501(c)(3) engagement with a political candidate, party, or partisan group. Therefore, the risk of adverse publicity for your efforts should be considered in deciding whether to deal with them in any manner.

Note that 501(c)(3) organizations may coordinate their voter protection efforts with other **501(c)(3) organizations, and with other kinds of tax-exempt groups, businesses and other organizations, so long as the 501(c)(3)'s collaborators themselves are complying with 501(c)(3) nonpartisan standards in their coordinated efforts.**

Hypotheticals:

Political Party X invites officials or staff of 501(c)(3) organizations to participate in private briefings to discuss voter engagement (voter registration and GOTV) strategies.

501(c)(3) organizations cannot participate in such meetings. The danger is that by sharing plans and strategies, either the campaign or a 501(c)(3) will allocate its resources accordingly. For instance, if the 501(c)(3) knows Party X is doing heavy voter registration in a particular neighborhood, the 501(c)(3) could shift its resources elsewhere; or, Party X may choose not to hire workers in State T after hearing that a 501(c)(3) will be doing extensive voter outreach in State T. Such post-meeting conduct could breach 501(c)(3) requirements or amount to an unlawful in-kind contribution to Party X by the 501(c)(3) group. In contrast, if a party hosts a public briefing, a 501(c)(3) organization may attend in order to learn public information, so long as it otherwise acts consistently with its 501(c)(3) status.

A 501(c)(3) organization prepares a voter outreach plan and wants to share it with candidates running in the jurisdiction.

The 501(c)(3) can do so only if it previously or simultaneously publicly disseminates the information (such as in a press release or by posting on its website), and it sends the plan to all candidates in a particular race or all political parties in the jurisdiction.

A 501(c)(3) organization hears about voter intimidation efforts in a particular state, and calls both major political parties to alert them to this.

A 501(c)(3) organization can encourage voters to exercise their right to vote. In doing so, if a 501(c)(3) identifies voter intimidation practices that interfere with the right to vote, it can contact the local election administration agency or other appropriate election representatives to resolve the issue, contact a bipartisan set of candidates or parties in a race and urge them to weigh in, and contact the news media as well. Note that in some jurisdictions there are viable third parties, and, if so, they should be contacted along with the two major parties.

Political Party Z is concerned about the voter intimidation efforts in a particular state, and reports it to a 501(c)(3) organization.

Although there is less risk when a partisan source, uninvited, provides information to a 501(c)(3) organization in a one-way communication, the 501(c)(3) organization must exercise caution in responding and must not use the information in a partisan manner. The organization can investigate and take appropriate steps to protect voters in accordance with its own charitable mission. However, it cannot enter into joint efforts with Party Z to do so or share its findings with Party Z before making the information public. And, if it mentions Party Z as the source of the original information, it should do so without praise and say that it welcomes such information from all sources and will treat all information received on its merits. If the 501(c)(3) organization takes action as a result of information received from a party or campaign committee (especially if the 501(c)(3) alters previously planned activities), it should have clearly articulated reasons why these new activities further its nonpartisan, voter protection goals. If previously planned activities were changed as a result of this information, then the 501(c)(3) must determine that the new activity provides greater nonpartisan voter protection benefits than the previously planned activities.

A 501(c)(3) organization brings a lawsuit alleging voter registration misconduct in several college towns in a state. Political Party B and Candidate A have factual evidence and legal arguments that they believe will strengthen the 501(c)(3)'s case. Can the 501(c)(3) meet with representatives of the party and the candidate to discuss their suggestions? Can the party or the campaign otherwise provide this information to the 501(c)(3)?

To avoid partisan coordination or even its appearance, the 501(c)(3) should not meet with representatives of the party or candidate unless representatives from other parties and opposing candidates also attend. Instead, the party, the candidate, or both may provide the information to the 501(c)(3) by (i) issuing a press release or otherwise making the information publicly available or (ii) sending the materials, unsolicited, to the 501(c)(3). The 501(c)(3) must determine whether or not the evidence and/or arguments further its nonpartisan, voter protection litigation goals and not just the partisan goals of Party B or Candidate A. Even if the materials do further its goals, the 501(c)(3) should ensure that its litigation decisions are undertaken independently and incorporate any received legal research or argument in its pleadings after a critical analysis of them and in its own words.

NOTES

- ¹ 2 U.S.C. § 438(f).
- ² For example, since 1980 the Internal Revenue Service (IRS) has “reserved” the question of whether or not a tax-exempt organization that uses its regular treasury funds to engage in political activities that are permissible under FECA (such as express-advocacy communications to its own members or administration of its own federal PAC) subjects itself to potential taxation as a result. 26 C.F.R. § 1.527-6(b)(3). Until the IRS acts further, these activities are not taxable. And, the FEC’s regulation permitting corporations and unions to make a single public announcement of its endorsement of a federal candidate includes an explicit warning to 501(c)(3)s to be mindful of the IRS rules. See 11 C.F.R. § 114.4(c)(6). However, the FEC’s other regulations do not provide this helpful caution.
- ³ A private letter ruling is not precedential guidance, and may not be relied on by anyone other than the taxpayer to whom it was issued. But such rulings do provide insight into how the IRS analyzed a particular set of facts at a particular point in time.
- ⁴ IRS Revenue Ruling (Rev. Rul.) 2004-6, 2004-1 C.B. 328; Rev. Rul. 2007-41, 2007-1 C.B. 1421.
- ⁵ 558 U.S. ___, 130 S.Ct. 876 (2010).
- ⁶ Internal Revenue Code (IRC) § 501(c)(3). All sections of the Internal Revenue Code can be found in Title 26 of the United States Code.
- ⁷ *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). That Supreme Court decision is predicated on the right of 501(c)(3) organizations to establish affiliated 501(c)(4) organizations, which are less restricted in their political activities. For further discussion, see *Chapter V*, “Issue Advocacy.”
- ⁸ Donors must be informed that donations are not tax deductible. IRC § 6113; IRS Notice 88-120, 1988-2 C.B. 454.
- ⁹ Some rules are simplified for purposes of illustration.
- ¹⁰ Compare IRC § 527(f) with California Revenue & Taxation Code § 23701r.
- ¹¹ See generally Gregory L. Colvin & Lowell Finley, *Seize the Initiative* (Alliance for Justice, 1996) [hereinafter *Seize*].
- ¹² In 1969, Congress divided the world of § 501(c)(3) organizations into “private foundations” and all others, which are known as “public charities.” A group’s IRS exemption letter states whether the group is a private foundation or a public charity. Private foundations are subject to additional restrictions; for instance, private foundations are taxed on any lobbying expenditures they make. Unless specifically stated, this publication describes the rules for public charities only. For information on the rules for private foundations, see *Investing in Change: A Funder’s Guide to Supporting Advocacy* (Alliance for Justice, 2004) [hereinafter *Investing in Change*].
- ¹³ To determine the percentage of a public charity’s total exempt purpose expenditures that can be spent on lobbying, see *Worry-Free Lobbying: How to Use the 501(h) Election to Maximize Effectiveness 5* (Alliance for Justice, 2003) [hereinafter *Worry-Free Lobbying*].
- ¹⁴ For more information on the 501(h) election, see *Worry-Free Lobbying*, *supra* note 14 and Gail M. Harmon, Jessica A. Ladd, & Eleanor A. Evans, *Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities* (Alliance for Justice, 1995) [hereinafter *Being a Player*].

- ¹⁵ Making the 501(h) election does nothing to change your 501(c)(3) tax-exempt status. It merely enables your group to benefit from the expenditure tests for lobbying. *See generally Seize, supra* note 12, at 9-11 & 45-47 or *Worry-Free Lobbying, supra* note 14.
- ¹⁶ Some states classify recall elections as ballot measures, *see, e.g.*, California Gov't Code § 82043. A recall vote might be treated by the IRS as candidate-related, and therefore prohibited for 501(c)(3) organizations, rather than as a ballot measure. The IRS has not yet ruled on this question.
- ¹⁷ *See Seize, supra* note 12, at 9.
- ¹⁸ *Id.*, at 10.
- ¹⁹ *Id.*, at 14.
- ²⁰ For the history of this prohibition, see Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 23-29 (2003).
- ²¹ 26 CFR § 1.501(c)(3)-1(c)(3)(iii).
- ²² Although no IRS precedent exists on the question, calling for the impeachment or resignation of an elected public official is probably permissible as lobbying under IRC § 501(c)(3). *See* Chapter V, Section I(4), "Recall, Expulsion and Impeachment of Elected Officials" for more information.
- ²³ IRS General Counsel Memorandum (GCM) 39811 (Feb. 9, 1990).
- ²⁴ *Association of Bar of City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).
- ²⁵ IRS Notice 88-76, 1988-2 C.B. 392.
- ²⁶ GCM. 39694 (Jan. 22, 1988). *See generally* 26 U.S.C. § 527(f).
- ²⁷ 2 U.S.C. § 431(2); 11 C.F.R. § 100.3(a).
- ²⁸ 11 C.F.R. § 100.131.
- ²⁹ 2 U.S.C. § 431(3); 11 C.F.R. § 100.4.
- ³⁰ IRC § 504; *Election Year Issues*, IRS Exempt Organizations Continuing Professional Education (CPE) Technical Instruction Program (FY2002) 336, 338 [hereinafter *Election Year Issues*].
- ³¹ *See* Rev. Rul. 2004-6, 2004-1 C.B. 328 (discusses when activity constitutes partisan political activity for 501(c)(4) organizations).
- ³² IRS Revenue Procedure (Rev. Proc.) 86-43, 1986-2 C.B. 729.
- ³³ *Branch Ministries, Inc. v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).
- ³⁴ All Saints Church Web site, IRS Drops the Case, <http://www.allsaints-pas.org/irs-exam/> (last accessed June 30, 2010).
- ³⁵ *See* IRS Publication 1828, Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law (Rev. Nov. 2009) (available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>) (last accessed June 30, 2010).
- ³⁶ 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5(a); FEC, Supplemental Explanation and Justification, "Political Committee Status," 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007).

- ³⁷ 2 U.S.C. §§ 431(17)(A), 434(c), 441b(a); 11 C.F.R. §§ 100.113, 104.4, 114.2; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).
- ³⁸ *See* 11 C.F.R. § 100.22(a).
- ³⁹ 11 C.F.R. § 100.22(b).
- ⁴⁰ *See, e.g.*, *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997).
- ⁴¹ Conciliation Agreement ¶ 24, FEC MURs 5511, 5525, Swift Boat Veterans and POWs for Truth (Dec. 13, 2006).
- ⁴² Conciliation Agreement ¶ 27, FEC MUR 5487, Progress for America Voter Fund (Feb. 28, 2007).
- ⁴³ Conciliation Agreement ¶ 16, FEC MUR 5753, League of Conservation Voters 527, League of Conservation Voters 527 II, League of Conservation Voters Action Fund (Dec. 13, 2006).
- ⁴⁴ Conciliation Agreement ¶¶ 15-18, FEC MURs 5577, 5620, National Association of Realtors, National Association of Realtors PAC, National Association of Realtors-527 Fund (June 18, 2007).
- ⁴⁵ Certification and Factual and Legal Analysis, FEC MUR 5854, The Lantern Project (Feb. 12, 2009); Certification and Factual and Legal Analysis, FEC MUR 6073, Patriot Majority, *et al.* (April 2, 2009); Amended Certification (March 17, 2009) and Statement of Reasons of Chairman Walther and Commissioners Bauerly and Weintraub (April 30, 2009), FEC MUR 5988, American Future Fund; Statement of Reasons of Chairman Walther and Commissioners Bauerly and Weintraub (April 23, 2009), and Statement of Reasons of Vice Chairman Peterson and Commissioners Hunter and McGahn (April 27, 2009), FEC MURs 5694 and 5910, Americans for Job Security, Inc., *et al.* *See also* Statement of Reasons of Vice Chairman Peterson and Commissioners Hunter and McGahn (Jan. 22, 2009), and Statement of reasons of Commissioners Bauerly and Weintraub ((Dec. 19, 2008), FEC MUR 5541, The November Fund and U.S. Chamber of Commerce.
- ⁴⁶ Statement of Reasons of Vice Chairman Peterson and Commissioners Hunter and McGahn, FEC MURs 5977 and 6005, American Leadership Project, *et al.* (May 1, 2009).
- ⁴⁷ 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.
- ⁴⁸ 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.
- ⁴⁹ 2 U.S.C. §§ 441b(b)(2), 441b(c); §§ 114.2(b)(2)(iii), 114.14.
- ⁵⁰ 2 U.S.C. §§ 434(f)(3); 11 C.F.R. § 100.29.
- ⁵¹ 2 U.S.C. § 434(f); 11 C.F.R. §§ 104.20, 114.14.
- ⁵² *See generally* 2 U.S.C. § 431(8); 11 C.F.R. §§ 100.51-100.93.
- ⁵³ *FEC v. Beaumont*, 539 U.S. 146 (2003). Specifically, individuals and unincorporated associations that are allowed to contribute may contribute \$2,400/election (indexed every two years for inflation) to a candidate; \$30,400/year (also indexed) to a national political party; and \$10,000/year to the federal account of a state or local party committee; federal PACS may contribute \$5,000/election, \$15,000/year and \$5,000/year, respectively; and business, nonprofit and *MCFL* corporations may not contribute at all. 2 U.S.C. § 441a; 11 C.F.R. §§ 110.1, 110.2. These amounts are the contribution limits for the 2009-2010 election cycle; check the FEC's website in subsequent cycles for changes in the indexed amounts.

- ⁵⁴ The FEC's post-BCRA coordination regulations, which were issued originally in 2002 and then revised in response to litigation during 2006, *see* FEC, "Coordinated Communications," 71 Fed. Reg. 33190, 33190-92 (June 8, 2006), were partially invalidated, *see* Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008). At publication time, the FEC was seeking comments on a new Notice of Proposed Rulemaking to implement the Court's decision, "Coordinated Communications," 74 Fed. Reg. 53893-53913 (Oct. 21, 2009)—NEED TO ADD RE_OPENED NPRM, http://www.fec.gov/pdf/nprm/coord_commun/2009/notice_2009-23.pdf.
- ⁵⁵ 11 C.F.R. § 109.21(a).
- ⁵⁶ 11 C.F.R. § 109.21(c).
- ⁵⁷ 11 C.F.R. § 109.21(d). Notably, the coordination rules apply only to the sharing of non-public information concerning a candidate or party; a group *may* share non-public information about its *own* plans, projects, activities or needs with a candidate or party so long as the latter does not "assent" or otherwise seek to influence the group's potential public communications and activities. FEC, Final Rules, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 432 (Jan. 3, 2003).
- ⁵⁸ 11 C.F.R. § 109.21(d)(4).
- ⁵⁹ 11 C.F.R. § 114.3(a).
- ⁶⁰ *Election Year Issues*, *supra* note 30, at 376.
- ⁶¹ *Id.*
- ⁶² Rev. Rul. 2007-41, *supra*.
- ⁶³ *Id.*
- ⁶⁴ *Election Year Issues*, *supra* note 30, at 345, *citing* IRS Technical Advice Memorandum (TAM) 91-17-001 (Sept. 5, 1990).
- ⁶⁵ Rev. Rul. 2007-41, *supra*.
- ⁶⁶ For instance, a disclaimer might state that an organization is recognized as a public charity under Section 501(c)(3) of the Internal Revenue Code and, as a result, does not endorse or oppose any candidate for elected public office. This statement, of course, should be made in good faith. The credibility of the disclaimer will depend on the circumstances.
- ⁶⁷ *See Seize*, *supra* note 12, at 18-19.
- ⁶⁸ Rev. Rul. 78-248, 1978-1 C.B. 154 (Situations 1 and 4).
- ⁶⁹ Rev. Rul. 80-282, 1980-2 C.B. 178.
- ⁷⁰ 11 C.F.R. § 114.4(c)(4).
- ⁷¹ FEC Advisory Opinion No. (AO) AO 2000-16.
- ⁷² 11 C.F.R. § 106.4. A poll is valued at 100% of its cost during the first 15 days; 50% when it is 16 to 60 days old; 5% when it is 61 to 180 days old; and zero afterward. 11 C.F.R. § 106.4(g). Also, the FEC has said that proceeds from the sale of a poll by a candidate committee to a labor union must be treated as a contribution to the candidate (and such a contribution is impermissible for a union). AO 1980-19.
- ⁷³ *See* Rev. Rul. 2007-41, Situations 7-13, which address a variety of situations involving candidate appearances.

- ⁷⁴ 11 C.F.R. § 114.4(c)(7).
- ⁷⁵ 11 C.F.R. § 114.3(c)(2).
- ⁷⁶ The coordinated aspect of the arrangement probably means that this restriction remains valid after *Citizens United*.
- ⁷⁷ 11 C.F.R. § 114.4(b)(1).
- ⁷⁸ AO 1999-34; AO 1996-11; AO 1986-37; AO 1986-26; AO 1984-13.
- ⁷⁹ Rev. Rul. 78-248, Situation 2.
- ⁸⁰ IRS memo for all Exempt Organizations Revenue Agents from Marsha A. Ramirez, Director, Exempt Organizations Examinations, July 28, 2008 (available at <http://www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf>) (last accessed October 29, 2009).
- ⁸¹ Gregory L. Colvin, *IRS Gives Christian Coalition a Green Light for New Voter Guides*, TAX NOTES 1093 (November 21, 2005). (available at http://www.adlercolvin.com/pdf/tax_treatment/TaxNotes-IRSGivesChristian.pdf) (last accessed June 30, 2010).
- ⁸² Rev. Rul. 2007-41.
- ⁸³ *Id.*
- ⁸⁴ *Election Year Issues*, *supra* note 30, at 373.
- ⁸⁵ *See Id.* at 374-375, *citing* TAM 96-35-003 (April 19, 1996).
- ⁸⁶ *Id.*, at 375.
- ⁸⁷ *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989).
- ⁸⁸ *See Election Year Issues*, *supra* note 30, at 374-375, *citing* TAM 96-35-003.
- ⁸⁹ Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,262 (Dec. 14, 1995).
- ⁹⁰ 11 C.F.R. §§ 100.92, 110.13, 114.4(f).
- ⁹¹ 2 U.S.C. § 434(f)(3)(B)(iii); 11 C.F.R. § 100.29(c)(4).
- ⁹² AO 1986-37; AO 1986-26. Although BCRA exempted forums as well as debates from the now-invalidated prohibition of electioneering communications, 2 U.S.C. § 434(f)(3)(B)(iii), there has been no indication that the FEC has relaxed its treatment of them otherwise.
- ⁹³ *Being a Player*, *supra* note 15, at 23.
- ⁹⁴ 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §114.3.
- ⁹⁵ Rev. Rul. 2007-41.
- ⁹⁶ For a recent example of the IRS's application of this point, *see* TAM 200908050, in which a 501(c)(3) organization was held to have violated the candidate electioneering prohibition because it allowed its 501(c)(4) to post electioneering content on its Web pages, even though the content was identified as the (c)(4)'s and the (c)(4) reimbursed the (c)(3) for the cost of those pages.
- ⁹⁷ Rev. Rul. 2007-41, and FS-2006-17.

- ⁹⁸ Directive from Marsha A. Ramirez, Director, Exempt Organizations Examinations, Internal Revenue Service (IRS), to all IRS Exempt Organizations Revenue Agents, re: Political Campaign Activity on the Internet (July 28, 2008) (available at <http://www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf>) (last accessed June 30, 2010).
- ⁹⁹ *Id.*
- ¹⁰⁰ *Id.*
- ¹⁰¹ See *Shays v. FEC*, 337 F. Supp. 2d 28, 64-70, 112 (D.D.C. 2004), *aff'd on other grounds*, 414 F. 3d 76 (D.C. Cir. 2005); FEC, Final Rules, "Internet Communications." 71 Fed Reg. 18589, 18589-91 (April 12, 2006) (hereinafter "FEC Internet Explanation").
- ¹⁰² *Id.*, FEC Internet Explanation at 18596; AO 1999-07. But, a 501(c)(3)'s entire website is still subject to the usual IRC content constraints.
- ¹⁰³ FEC Internet Explanation at 18596.
- ¹⁰⁴ 11 C.F.R. §§ 100.26, 100.94, 100.155; FEC Internet Explanation, *supra*, at 18593-97, 18603-07.
- ¹⁰⁵ 2 U.S.C. § 441a(a)(7)(B)(iii); 11 C.F.R. §§ 109.21(c)(2), 109.21(d)(6), 109.23(a), 114.3(c)(1)(ii), 114.3(c)(2)(ii).
- ¹⁰⁶ 11 C.F.R. §§ 109.23(b)(4), 114.3(c)(1)(ii).
- ¹⁰⁷ See Rev. Rul. 2007-41, Situations 3-6, which address a variety of situations involving individual activity by organization leaders.
- ¹⁰⁸ See IRS Fact Sheet (FS) FS-2006-17 (Feb. 2006).
- ¹⁰⁹ *Seize*, *supra* note 12, at 18-19.
- ¹¹⁰ The FEC's endorsement regulation includes an explicit warning to 501(c)(3)s to be mindful of the IRS rules. See 11 C.F.R. § 114.4(c)(6). Neither the release nor the press conference may be "coordinated" with the candidate (*see* 11 C.F.R. § 114.4(c)(6)(ii))—meaning it can't occur at the candidate's request or suggestion, or otherwise result from other contacts discussed in Chapter IV(E) above. This most certainly means that the candidate cannot be present at the press conference, even at her campaign's own cost.
- ¹¹¹ See 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.54.
- ¹¹² 11 C.F.R. § 109.3; FEC, Revised Explanation and Justification, "Definitions of 'Agent' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures," 71 Fed. Reg. 4975 (Jan. 31, 2006).
- ¹¹³ Private foundations making grants earmarked for voter registration drives are more tightly restricted under IRC § 4945(f). Such grants are allowed only to charities that carry on voter registration in five or more states and in more than one election cycle, and that meet other specific criteria. See *Investing in Change*, *supra* note 13, at 18.
- ¹¹⁴ For an IRS example of a biased GOTV approach, see Rev. Rul. 2007-41, Situation 2.
- ¹¹⁵ PLR 9609007 (Dec. 6, 1995).
- ¹¹⁶ 11 C.F.R. § 114.4(d).
- ¹¹⁷ 11 C.F.R. § 114.4(c)(2).

- ¹¹⁸ 11 C.F.R. § 114.4(c)(3)(i), (ii) and (iv).
- ¹¹⁹ 11 C.F.R. § 114.4(c)(3)(iii).
- ¹²⁰ Rev. Rul. 76-456, 1976-2 C.B. 151.
- ¹²¹ AO 1987-7.
- ¹²² AO 2003-24.
- ¹²³ IRS letter ruling issued to Independent Sector (Sept. 4, 1980).
- ¹²⁴ Before sharing any personal information that has been collected, an organization should be sensitive to individual privacy concerns and comply with any applicable federal or state privacy laws, as well as its own privacy policy.
- ¹²⁵ see B. Holly Schadler, *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations* (Alliance for Justice, 2006) at 8 [hereinafter *The Connection*].
- ¹²⁶ <http://www.lcvef.org/state-lcv-education-funds/list-enhancement/> (League of Conservation Education Fund's Web page, last accessed June 30, 2010).
- ¹²⁷ AO 2002-14.
- ¹²⁸ Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007).
- ¹²⁹ These rules concerning the *group's* transactions should be distinguished from those that pertain to an *employee's* use of a group's facilities as an individual volunteer, described in Chapter V, "Personal Activities."
- ¹³⁰ 2 U.S.C. § 431(8)(A); 11 C.F.R. §§ 100.52, 100.54, 114.2(f). An exception, unavailable to a 501(c)(3) for IRC reasons, is the provision of a regular employee to provide certain legal or accounting services to a candidate, party or other political committee. 2 U.S.C. § 431(8)(B)(viii); 11 C.F.R. §§ 100.85, 100.86.
- ¹³¹ 11 C.F.R. §§ 114.2(f)(2)(i), 114.9(d).
- ¹³² 11 C.F.R. § 114.13.
- ¹³³ AO 2003-19; AO 2002-14; AO 1992-24. However, purchasing a poll that a campaign paid for in the course of its political activity may be an exception. AO 1980-19.
- ¹³⁴ 11 C.F.R. § 100.53.
- ¹³⁵ 11 C.F.R. § 109.3; FEC, Revised Explanation and Justification, "Definitions of 'Agent' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures," 71 Fed. Reg. 4975 (Jan. 31, 2006).
- ¹³⁶ See 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.54.
- ¹³⁷ 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.74.
- ¹³⁸ 11 C.F.R. § 100.54(c).
- ¹³⁹ 11 C.F.R. § 114.12(c)(1); AO 1992-03.
- ¹⁴⁰ 11 C.F.R. § 114.12(c)(2).
- ¹⁴¹ 11 C.F.R. § 100.54(a).

- ¹⁴² 11 C.F.R. § 114.9(a)(1).
- ¹⁴³ 11 C.F.R. § 114.9(a)(1) and (2).
- ¹⁴⁴ 11 C.F.R. § 114.9(a)(1).
- ¹⁴⁵ 11 C.F.R. §§ 100.52(d)(2).
- ¹⁴⁶ 11 C.F.R. § 114.9(c).
- ¹⁴⁷ For a general discussion of permissible transactions between a charity and a noncharitable exempt organization, such as a 501(c)(4) affiliate, *see The Connection*, *supra* note 137, at Chapter II.
- ¹⁴⁸ 2 U.S.C. § 441b(b)(2)(C).
- ¹⁴⁹ AO 2000-20; AO 1997-26; AO 1997-15; AO 1995-38; AO 1984-12.
- ¹⁵⁰ *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989).
- ¹⁵¹ AO 1985-17.
- ¹⁵² AO 1979-67.
- ¹⁵³ 2 U.S.C. § 441i(a).
- ¹⁵⁴ 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i), 441b(a).
- ¹⁵⁵ AO 1991-17.
- ¹⁵⁶ *See Election Year Issues*, *supra* note 30, at 339-344.
- ¹⁵⁷ 2 U.S.C. § 431(1)(A); 11 C.F.R. § 100.2(a), (b) and (d); AO 2000-29.
- ¹⁵⁸ As of the publication date, the states are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. See National Conference of State Legislatures, <http://www.ncsl.org/programs/legismgt/elect/irstates.htm>, and Ballot Initiative Strategy Center, <http://www.ballot.org/page/-/ballot.org/maps/Initiative%20states.pdf>, for more information about the ballot initiative process. There is no federal or national counterpart to the ballot measure.
- ¹⁵⁹ States are precluded, however, from restricting the funding of ballot measure committees. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
- ¹⁶⁰ 2 U.S.C. §§ 441a; 11 C.F.R. § 300.2(c); AO 2004-29; AO 2003-12.
- ¹⁶¹ GCM 39694 (Jan. 28, 1988).
- ¹⁶² <http://www.irs.gov/charities/article/0,,id=141372,00.html> (last accessed on June 30, 2010).
- ¹⁶³ As discussed above, should it ever be applied to nominations, the Section 527(f) tax would be imposed on the lesser of the organization's political expenditures or on its investment income in the fiscal year when the expenditures occurred. Organizations that have no investment income would face no tax liability. For more information on the 527(f) tax as applied to 501(c) organizations, *see The Connection*, *supra* note 137 at 14.
- ¹⁶⁴ *See* 2 U.S.C. § 431(1); 11 C.F.R. § 100.2.

- ¹⁶⁵ U.S. Constitution, Art. I, Sec. 5, cl.2, and Art. II, Sec. 4; Jack Maskell, American Law Division, Congressional Research Service, “Recall of Legislators and the Removal of Members of Congress From Office” (March 26, 2010), (located at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C%2APL%5B%3A%230%20%20%0A>) (last accessed June 30, 2010).
- ¹⁶⁶ IRS Notice 88-120, 1988-2 C.B. 454 (Nov. 25, 1988).
- ¹⁶⁷ For information about fundraising for a 501(c)(4), see *The Connection*, *supra* note 137, at Chapter II.
- ¹⁶⁸ PLR 9609007 (Dec. 6, 1995).
- ¹⁶⁹ TAM 200044038 (July 24, 2000).
- ¹⁷⁰ See PLR 200602042 (Oct. 19, 2005).
- ¹⁷¹ PLR 9609007.
- ¹⁷² 2 U.S.C. § 441i(d); 11 C.F.R. §§ 300.11, 300.50.
- ¹⁷³ 2 U.S.C. § 439a(a)(3); 11 C.F.R. §§ 113.1(g)(2), 113.2(b); AO 2003-32, 2 U.S.C. § 441i(e)(1)(A), 11 C.F.R. § 300.61.
- ¹⁷⁴ 2 U.S.C. § 441i(e)(4)(A); 11 C.F.R. §§ 300.52(a), 300.65(a).
- ¹⁷⁵ 2 U.S.C. § 441i(e)(4)(B); 11 C.F.R. §§ 300.52(b), 300.65(b).
- ¹⁷⁶ 11 C.F.R. §§ 300.52(e), 300.65(e).
- ¹⁷⁷ AO 2004-25.
- ¹⁷⁸ 2 U.S.C. § 441i(d)(1); 11 C.F.R. §§ 300.37, 300.51. However, a party committee at any level, from national to local, may “respond to a request for information about a tax-exempt group that shares the party’s political or philosophical goals.” 11 C.F.R. §§ 300.11(f), 300.37(f), 300.50 (f); 300.51(f). Such a characterization, however, may be problematic for a 501(c)(3) due to the IRC.
- ¹⁷⁹ AO 2003-39; AO 2003-04.
- ¹⁸⁰ AO 1994-06.
- ¹⁸¹ AO 2006-30.
- ¹⁸² AO 2003-23.
- ¹⁸³ AO 2004-19.
- ¹⁸⁴ 11 C.F.R. §§ 100.54, 114.2(f). An important exception, discussed at Chapter V, “Employee Payroll-Deducted PAC Contributions,” is administration of a payroll deduction plan for an employee’s own political contributions.
- ¹⁸⁵ 11 C.F.R. § 114.2(f). The only exception is that a group may encourage its restricted class to contribute to a particular candidate or party, 11 C.F.R. § 114.2(f)(4)(ii); but, for IRC reasons, a 501(c)(3) may not do this.
- ¹⁸⁶ TAM 200446033 (June 15, 2004). The IRS determined that 501(c)(3) hospital system’s efforts to inform employees of the payroll deduction plan, including a video featuring the system’s CEO and produced using charity resources, was in essence an endorsement of a specific PAC and therefore a political expenditure.

¹⁸⁷ PLR 200151060 (Sept. 27, 2001).

¹⁸⁸ 11 C.F.R. § 114.2(f)(4)(i).

¹⁸⁹ *Id.*

¹⁹⁰ 11 C.F.R. § 102.6(c)(3).

¹⁹¹ 11 C.F.R. §114.5(b); AO 1981-39; AO 1979-21.

¹⁹² 11 C.F.R. § 114.11.

¹⁹³ The IRS first released guidance in 2006 in the form of a Fact Sheet (Fact Sheet FS-2006-17), and subsequently released a Revenue Ruling (Rev. Rul. 2007-41) providing binding precedent very similar in content to the earlier Fact Sheet.

¹⁹⁴ For more information about Matters Under Review (MUR), see the FEC's Filing a Complaint brochure (June 2008), <http://www.fec.gov/pages/brochures/complain.shtml> (last accessed June 30, 2010).

¹⁹⁵ 2 U.S.C. § 437g(a)(1); 11 C.F.R. §§ 111.4-111.6.

¹⁹⁶ See FEC, "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," 72 Fed. Reg. 12545 (March 16, 2007).

¹⁹⁷ 2 U.S.C. § 437g(a)(1); 11 C.F.R. §§ 111.7, 111.9-111.15.

¹⁹⁸ 2 U.S.C. § 437g(a)(3); 11 C.F.R. §§ 111.16-111.18; FEC, "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed. Reg. 7551 (Feb. 16, 2007).

¹⁹⁹ 2 U.S.C. §§ 437g(a)(5)-(7); 11 C.F.R. § 111.19.

²⁰⁰ 2 U.S.C. § 437g(a)(12); 11 C.F.R. §§ 111.20-11.21; FEC, "Statement of Policy Regarding Disclosure of Closed Enforcement Cases and Related Files," 68 Fed Reg. 70426 (Dec. 18, 2003); *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003).



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