

## **GUIDELINES FOR POLITICAL ACTIVITIES OF NOT-FOR-PROFIT ORGANIZATIONS**

by James Bopp, Jr.,  
The Bopp Law Firm, PC<sup>1</sup>

As not-for-profit organizations move increasingly into political activities, the need for clear guidelines on the permissible activities of the various forms of non-profit organizations also increases. These guidelines summarize the requirements of the Internal Revenue Code, the Federal Election Campaign Act, the Bipartisan Campaign Reform Act (BCRA), and various U.S. Supreme Court decisions on the First Amendment protections for political speech, including *Citizens United v. Federal Election Commission* (2010).

These are guidelines for action, recommended to insure that not-for-profit organizations conform with the law. While the law may allow variations from these guidelines, experience has shown that the safest and best course for non-profit organizations is to act in conformance with these recommendations.<sup>2</sup> One caution, state laws may be more restrictive than these guidelines and, therefore, in applying them to specific situations, you should request specific legal advice.

### **FORMS OF ORGANIZATIONS**

#### **Organizations Exempt under 501(c)(4): Lobby groups**

Social welfare and lobbying organizations are exempt under 501(c)(4) of the Internal Revenue Code. Such organizations are usually membership organizations through which your membership activity takes place and under which you do your administrative activity and lobbying. Membership dues are paid to this organization. A 501(c)(4) organization is called a social action organization by the Internal Revenue Service. This means that the group:

- (1) is exempt from paying federal income taxes, but donations to it are *not* tax deductible; and
- (2) may educate, lobby for legislation and may intervene in political campaigns, as long as their political activity is an insubstantial amount of their expenditures. Any political activity, however, may also be subject to applicable federal and state campaign finance laws.

#### **Organizations Exempt under 501(c)(3): Educational organizations**

---

<sup>1</sup> For questions, contact James Bopp, Jr., The Bopp Law Firm, PC, The National Building, 1 South 6th Street, Terre Haute, IN 47807, voice 812-232-2434, fax 812-235-3685, [www.boppplaw.com](http://www.boppplaw.com), [jboppjr@aol.com](mailto:jboppjr@aol.com).

<sup>2</sup>These guidelines should not be construed as legal advice regarding your particular situation.

Religious, educational, and charitable organizations are exempt under 501(c)(3) of the Internal Revenue Code. Corporations exempt under 501(c)(4) may also have an internal educational trust fund that is exempt under 501(c)(3). These funds raise and expend funds exclusively for religious and educational purposes. An educational organization or fund:

- (1) is exempt from paying federal income taxes, and donations to it *are* tax deductible on both state and federal tax returns; and
- (2) may expend funds for educational purposes and an insubstantial amount on lobbying and to promote legislation.

A 501(c)(3) exempt organization, however, may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” Thus, a 501(c)(3) organization may not participate in a political campaign by expenditure of its funds. Not all activity that may influence an election, however, falls under this prohibition.

Churches and noncommercial broadcast stations are examples of 501(c)(3) organizations with which not-for-profit organizations will often work.

### **Organizations exempt under Section 527: Political Action Committees**

Organizations that intervene in political campaigns are tax exempt under Section 527 of the Internal Revenue Code. A 527 is any organization of two or more people whose principal purpose is to engage in active electioneering by contributing to candidates or by influencing candidate elections. A 527 organization, under the Internal Revenue Code:

- (1) is exempt from paying federal income taxes;
- (2) may actively support candidates for political office; and
- (3) may spend an insubstantial amount of its funds on educational and lobbying activities (a federal tax is imposed, however, on its educational and lobbying expenditures).

Section 527 organizations are commonly, but not always, also regulated by federal and state campaign finance laws and are thus register as a political action committee (“PAC”). There are two types of PACs, regular PACs and SuperPACs. Regular PACs are ones that contribute to candidates and may also do independent expenditures. Under federal law, regular PACs are subject to a prohibition on corporate contributions to them and an individual contribution limit to them of \$5,000 annually. A SuperPAC is a PAC that only engages in independent expenditures and does not make contributions to candidates. SuperPACs may receive unlimited corporate and individual contributions.

## **Unified Structure**

The most efficient and effective structure for a not-for-profit organization engaged in public policy advocacy is a unified structure where the group is incorporated as a 501(c)(4) organization, which provides the organizational structure for the group, i.e., the Board of Directors, Officers, and staff, and employs all the employees. In addition, the 501(c)(4) corporation also creates and manages separate bank accounts for its 501(c)(3) educational arm, and its 527 political arm(s).<sup>3</sup> Each of these entities are subject to various limitations on their activities. As a result, the funding of the activities of the group is distributed among the various bank accounts in conformance with the legal restrictions and advantages of each.

These guidelines are about organizations. An individual may wear different hats at different times and, therefore, may be involved in each of these organizations, as long as he or she is wearing the right hat. In addition, each of these organizations may be controlled by the same group of individuals.

## **POLITICAL ACTIVITIES**

Political activities referred to here are activities designed to influence the election of candidates for public office<sup>4</sup> – often referred to as active electioneering. Activities which can influence the election of a political candidate are quite broad and range from contributions to a political candidate to activities such as publishing the voting record of incumbents who are also running for re-election. Only some of these activities are considered active electioneering which must be done only by a 527. Some of these activities, however, may even be done by a 501(c)(4) or 501(c)(3) organization; it depends on the type of activity and how the activity is conducted.

Active electioneering may be done by 527s. In addition, under the Internal Revenue Code, organizations exempt under IRC 501(c)(4) may also engage in an insubstantial amount of active electioneering, if also permitted by the applicable campaign finance law. Active electioneering involves actions such as endorsements of candidates and expenditures to expressly advocate the election or defeat of a clearly identified candidate for public office. Active electioneering is of three types: (1) direct contributions, which are monetary contributions *given* to a candidate; (2) in-kind contributions, which include giving anything of value to a candidate (such as an organization's mailing list) or paying for a communication that expressly advocates the election or defeat of a clearly identified candidate made in consultation with or with the knowledge of the candidate; and (3) independent expenditures, which are active electioneering communications

---

<sup>3</sup>It is not unusual for a group to have multiple 527 bank accounts, often registered as PACs: one for federal elections and one for each state whose elections the group is involved in.

<sup>4</sup>If a federal candidate is involved, federal law regulates the activity through the Federal Election Campaign Act. If a candidate for state office is involved, that state's campaign finance law applies. Unless otherwise indicated, these guidelines involve the requirements of federal campaign finance law.

made without the knowledge of and without consultation with any candidate. Entities whose principal purpose is active electioneering are Section 527 political organization under the Internal Revenue Code.

Corporations and labor unions, however, are prohibited by federal campaign finance law from giving contributions, whether direct or in-kind, to federal candidates and contributions by individuals and PACs to federal candidates are limited in amount. Individuals, PACs, and corporations and labor unions may make independent expenditures in advocating the election or defeat of federal candidates. Furthermore, FEC reports must be filed when independent expenditures exceed \$250 in any calendar year, using FEC Form 5. Some state campaign finance laws limit contributions to state candidates, which is permissible under the First Amendment, or limit independent expenditures in regard to state candidates, which is unconstitutional. Specific legal advice for each state is required.

Issue oriented speech can also influence elections. Issue advocacy, however, may not be limited by government and can be freely engaged in by both 501(c)(3) and 501(c)(4) groups, as well as PACs. Issue advocacy includes the discussion of issues of public concern, the actions of government officials in office, and the positions of candidates on issues, including criticizing and praising a candidate's position. As long as one does not use explicit words expressly advocating the election or defeat of a clearly identified candidate, one is free to praise or criticize officials and candidates – this is called issue advocacy.

An exception to this general rule on unrestricted issue advocacy is contained in certain recent changes in the Federal Election Campaign Act (FECA). This provision involves “electioneering communications,” defined as any broadcast, cable or satellite communications: (1) that refer to a “clearly identified federal candidate”; (2) that are “publicly distributed” “for a fee” within 30 days of a primary election, caucus or nomination convention, or within 60 days of a general election; and (3) that are “targeted to the relevant electorate” for those federal candidates identified in the communication.

Under the recent *Citizens United* U.S. Supreme Court decision (2010), corporations and labor unions may make electioneering communications, but these electioneering communications must be reported to the FEC, if over \$10,000, using FEC Form 9, and must contain a required disclaimer.

“Broadcast, cable, or satellite communication” includes communications by television and radio stations, cable television, and satellite systems to be received by 50,000 persons or more in the relevant federal election district. It does not include the internet.

“Clearly identified candidate” includes candidates’ names, nicknames, photographs, drawings or other unambiguous reference to the office held by an “incumbent” or status as a “candidate.”

“Publicly distributed” includes aired, broadcast, cablecast, or otherwise disseminated for a fee through the facilities of a television or radio station, cable TV system, or satellite system.

“Targeted to the relevant electorate” includes any communication that can be received by 50,000 or more persons in a Congressional district, and in the state of a candidate for Senate. With regard to candidates for President, the relevant electorate means the state in which a primary or caucus is held and means the whole U.S. with regards to nominating conventions and general elections.

An “electioneering communication” does not include a communication (1) appearing in newspaper or magazine ads, handbills, brochures, bumper stickers, yard signs, posters, billboards, mailings, internet, electronic mail, and telephone calls; (2) appearing in a news story, commentary, or editorial through the news media, unless the distribution facilities are owned or controlled by a political party, committee, or candidate; (3) which is an expenditure or independent expenditure under FECA; (4) which is a candidate debates or forums conducted pursuant to FEC regulations; and (5) which is a communication by a state or local candidate that refers to federal candidates only incidentally in relation to a state or local race.

### **List Use**

Many organizations have lists of supporters which they wish to use for political purposes. These lists may include membership lists, petition names, voter identification names and other supporter lists. Each of these lists can be used very effectively for political purposes but such use is limited, just like all political activities, by the type of organization which is planning the activity. The following are the options for each group:

- (1) transfer to a connected PAC. A 501(c)(4) organization may rent or sell, at fair market value (\$30 to \$50 per thousand), any list of supporters to a connected PAC for its use.
- (2) transfer to a candidate. A 501(c)(3) or 501(c)(4) organization may also rent the list directly to a candidate for limited use at fair market value. A PAC may also give the list to a candidate for limited use (which results in an in-kind contribution to the candidate by the PAC and may be subject to contribution limits).
- (3) mailing to the list(s). A PAC may mail endorsement material to the list itself. If the mailing is in consultation with or with the knowledge of the candidate, it is an in-kind contribution to the candidate; without the candidate’s knowledge, it is an independent expenditure.
- (4) mailing to members. A 501(c)(4) group may mail endorsement material to its members. If sent to its members, it is not limited at all and may send partisan and/or fundraising materials for its internal PAC (but if the membership mailing involves a federal candidate, the FECA requires it to be reported to the FEC, if the mailing expense is more than \$2,000, using FEC Form 7).

When an organization is renting a list, precautions should be taken to insure the list’s security. The list should be seeded with some names which will identify the list as the one rented

to that particular candidate. In addition, a written agreement should be signed providing the terms and conditions of the rental.

### **Federal Disclaimer**

Under federal law regarding federal candidates, both independent expenditures and electioneering communications must contain the disclaimer prescribed in detail at 11 CFR § 110.11. The disclaimer “must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the [organization] who paid for the communication, and that the communication was not authorized by any candidate or candidate’s committee.” The disclaimer must “must be presented in a clear and conspicuous manner” (and in print materials must be in a separate box with specified type point size).

In addition to these requirements, electioneering communications and broadcast independent expenditures must have the following audio statement: “XXX is responsible for the content of this advertising.” (The blank is to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payer unless the name of the connected organization is already provided in the “is responsible” statement). For television broadcasts, this disclaimer must be stated in voice-over or as a direct statement by a representative of the organization and included at the end of the communication (displayed for four seconds minimum, with legible contrast, and with letters that are at least 4% of the vertical picture height).

Examples:

If independent: “Paid for by the XXX Political Action Committee and not authorized by any candidate.”

If coordinated with the candidate and subject to contribution limits: “Paid for by the XXX Political Action Committee and authorized by the John Doe for Congress Committee.”

### **Federal Reporting Requirements**

FEC Form 5 is used to report independent expenditures, when the independent expenditure exceeds \$250. An annual expenditure or contract obligation of \$250 for independent expenditures, coupled with actual publication costs of an independent expenditure, triggers reporting requirements. Instructions are available at the FEC website, [www.fec.gov](http://www.fec.gov).

FEC Form 9 is used to report electioneering communications and is entitled 24 Hour Notice of Disbursements/Obligations for Electioneering Communications. An annual expenditure of \$10,000 triggers reporting requirements. Instructions are available at

The instructions explain that electioneering communication reports are due at the FEC (they may be faxed or e-mailed) by 11:59 p.m. of the day after (1) an electioneering communication is “publicly distributed” and (2) “the maker of the communication has also surpassed the \$10,000 disbursement threshold.” The \$10,000 threshold is calculated by adding the “direct costs of producing or airing the communication aired on the first reportable date plus the direct costs of any previously unreported electioneering communications.” Direct costs are those “charged by a vendor”— whether actually paid or contracted to pay— to produce the communication and costs of air time (including broker fees to purchase air time). When you hit the \$10,000 mark again with expenditures for electioneering communications, you file another FEC Form 9 reporting the new activity only.

FEC Form 9 requires that you list persons exercising control, which will be “officers, directors, executive directors or their equivalents.” These are publicly available anyway, so disclosure does not reveal any secrets about the internal workings of the corporation. For unincorporated organizations, report the owners or persons making the disbursements.

FEC Form 9 requires you to itemize donors to the organization who have given in aggregate \$1,000 or more since the first day of the preceding calendar year. If you want to disclose fewer donors, you can set up a separate segregated account to collect money for making electioneering communications (under 11 CFR §114.14(d)(2)), in which case you only report the \$1,000 donors to that separate segregated account. Of course, you must also report disbursements for electioneering communications, identifying the candidate referenced, the office sought, and the election involved.

Regarding state elections, state campaign finance laws should be consulted.

---

<sup>5</sup>According to the instructions, if you are doing your electioneering communication through a PAC, the PAC files FEC Form 3X and reports the disbursements on the PAC filing schedule “as expenditures or independent expenditures, as appropriate.” FEC regulations and personnel (Adam Ragan) explain that if a PAC makes what would be called an electioneering communication if done by anyone else, it is not called an electioneering communication. Instead, it is called an expenditure or an independent expenditure. If it is an electioneering communication, treat it as you would any other independent expenditure. If you have an electioneering communication (“an expenditure”) that does not contain express advocacy, the FEC says to report it on FEC Form 3X, Line 21(a) as an “operating expenditure” or on Line 29 as an “other disbursement.” We recommend using Line 29 because it makes more sense (i.e., it is not an “operating expense” like rent, utilities, etc.). On Schedule B, list your disbursement for an electioneering communication as a category “004 Advertising Expense” and describe it as an “advertising communication.” According to Adam Ragan at the FEC, you are not required to list the name of the candidate referenced in your electioneering communication.

## **Distribution of Political Material**

The distribution of political material is protected by the First Amendment of the United States Constitution. Thus, a person may freely distribute political flyers on public sidewalks and streets as long as traffic is not disrupted. In addition, as interpreted by some state courts, political flyers may be distributed on private property as long as that private property has been opened to the general public for its use. Thus, leafletting may take place in shopping center parking lots and sidewalks, when this property is open for public use.

Some churches have opened their property to public use, particularly their parking lots. In that circumstance, leafletting normally is allowable. It is not necessary to get permission from the church leaders to do so and such permission is generally not sought since it would be very reluctantly given. If, for some reason, church leaders refuse access to church parking lots, leafletting still may be conducted on the public sidewalks surrounding the church.

## **Federal PAC Fundraising**

Fundraising for a federal PAC is subject to some limitations. If the federal PAC is connected with a membership organization (a “connected PAC”), only members of the connected organization may be solicited for funds. “Members” are persons who have established some tangible relationship with the organization, e.g., by paying dues. If PAC fundraising includes the sale of some items, such as a yard sale or raffle, only members of the 501(c)(4) organization may be solicited to buy these items. A connected PAC may *accept* contributions from anyone, but it may *solicit* only the 501(c)(4)'s members. An independent PAC has no similar limitations.

Regarding state elections, state election laws should be consulted.

Many other activities may influence the election of a candidate. Some should be done by a PAC, but many others may be done by 501(c)(3) and 501(c)(4) organizations. The following chart gives a breakdown and describes which activities may be done by what group. A “yes” response means the activity is permissible, a “no” response means that it is not recommended. After the chart, a more detailed explanation is given for some of these activities.



**GUIDELINES FOR POLITICAL ACTIVITIES  
OF NOT-FOR-PROFIT ORGANIZATIONS**

		<u>Type of Organization</u>		
		<b>Exempt Under 501(c)(3)</b>	<b>Exempt Under 501(c)(4)</b>	<b>PAC</b>
(1)	Discuss the positions of political candidates on issues	Yes	Yes	Yes
(2)	Endorsement of political candidates	No	Yes	Yes
(3)	Financial contributions to political candidates	No	No	Yes
(4)	In-kind Contributions to political candidates	No	No	Yes
(5)	Independent expenditures in favor of or against political candidates	No	Yes	Yes
(6)	Fundraising projects for political candidates	No	No	Yes
(7)	Contributions to PAC's	No	No	Yes
(8)	Electioneering Communications regarding Federal candidates	Yes	Yes	Yes
(9)	Expenditures related to state referendums	Yes	Yes	Yes
(10)	Payment of expenses for attendance at caucus or state/national convention	No	No	Yes
(11)	Payment of administrative expenses of connected PAC	No	Yes	Yes
(12)	Appearance of political candidate at meeting	Yes	Yes	Yes
(13)	Candidate surveys	Yes	Yes	Yes
(14)	Voting records	Yes	Yes	Yes

**GUIDELINES FOR POLITICAL ACTIVITIES  
OF NOT-FOR-PROFIT ORGANIZATIONS  
(continued)**

		<u>Type of Organization</u>		
		<b>Exempt Under 501(c)(3)</b>	<b>Exempt Under 501(c)(4)</b>	<b>PAC</b>
(15)	Nonpartisan Voter education	Yes	Yes	Yes
(16)	Nonpartisan Voter registration	Yes	Yes	Yes
(17)	Voter identification activities	Yes	Yes	Yes
(18)	Non partisan Get out the vote activity	Yes	Yes	Yes
(19)	Lobbying for legislation	Yes	Yes	Yes
(20)	Distribution			
	(a) Political candidate literature	No	No	Yes
	(b) 501(c)(4) Voter Guides	No	Yes	Yes
	(c) 501(c)(3) Voter Guides	Yes	Yes	Yes
(21)	Rental of list(s) to political candidates			
	(a) At fair market value	Yes	Yes	Yes
	(b) At less than fair market value	No	No	Yes

(22) Newsletter Publication of:

(a) Political Ads at fair market value	Yes	Yes	Yes
(b) Political Ads at less than regular rate	No	No	Yes
(c) News stories	Yes	Yes	Yes
(d) Editorials	No	Yes	Yes

## EXPLANATION OF INDIVIDUAL ACTIVITIES

### **Item (1). Discuss the positions of candidates on issues.**

All organizations are free to discuss the positions of candidates on issues – including criticizing or praising them for their positions. This is called issue advocacy. Due to IRS Revenue Ruling 2004-6, this should be done only by 501(c)(3)s with legal advice.

### **Items (2) - (7). Active Electioneering.**

The endorsement of a candidate includes any statement which uses explicit words to expressly advocate the election or defeat of a clearly identified candidate, such as “elect,” “support,” “defeat,” or “oppose.” This is called express advocacy. Express advocacy communications in regard to federal candidates, i.e., independent expenditures, must be reported to the FEC if over \$250, using FEC Form 5, and must contain the required FEC disclaimer.

All active electioneering should be done under a PAC, corporation income tax exempt under IRC 501(c)(4), or labor union. While the IRS permits 501(c)(4) organizations to do these activities, as long as they constitute an insubstantial part of the overall expenditures of the 501(c)(4) (5 to 15% of the group’s expenditures), any active electioneering by a 501(c)(4) organization would be subject to tax by the IRS (and maybe limited or prohibited by federal or state campaign finance law). It is recommended, therefore, that such activities be conducted by a PAC. Under no circumstances can an organization exempt under 501(c)(3) participate in any of these activities.

A 501(c)(4) membership organization may also expressly advocate the election or defeat of a political candidate if the expenditures is for communications directed at the membership of the organization. If such an expenditure is in excess of \$2,000.00 for the election period regarding federal candidates, it must be reported to the Federal Election Commission, using FEC Form 7.

With regard to state elections, state laws vary widely on whether 501(c)(4) organizations, rather than a PAC, may contribute to state political candidates or make expenditures in connection therewith. Specific legal advice is required. Any political expenditure by a 501(c)(4) organization in federal or state races is subject to federal corporate income tax, but no more than the amount of its investment income minus \$100.00.

### **Item (4). In-kind Contributions to Candidates**

Also, be careful that your organization’s communications with candidates don’t fall into the new definition of “coordination” that converts independent expenditures and electioneering communications into in-kind contributions to candidates (or political parties). Under federal law

regarding federal candidates, coordination of a communication with a federal candidate does not require actual agreement between the candidate and an advocacy group. Under the new regulation 11 CFR § 109.20, “[c]oordinated means made in cooperation, consultation or concert with, or at the request or suggesting of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents.”

The definition of “coordinated communication” is in § 109.21. If your organization wants to make communications that identify a candidate and also wants to have contacts with that candidate (e.g., to promote legislation), the communication will become coordinated if it meets one content standard and one conduct standard.

(1) The content standard (only one required) identifies what sort of communications are subject to being coordinated, which are:

- (a) a communication that is an electioneering communication;
- (b) a communication that “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate . . .”;
- (c) a communication that expressly advocates the election or defeat of a clearly identified candidate; or
- (d) a public communication that (i) refers to a political party or *Presidential* candidate, (ii) is publicly disseminated within 120 days before any election (general, primary, caucus, or nominating convention), and (iii) is targeted to relevant voters; *or*
- (e) a public communication that (i) refers to a House or Senate candidate, (ii) is publicly disseminated within 90 days before any election (general, primary, caucus, or nominating convention), and (iii) is targeted to relevant voters.

(2) The conduct standard (only one required) identifies activity that completes a “coordinated communication,” if one of the content standards has been met:

- (a) *Request or suggestion* – the candidate (or, as always, an agent) requests or suggests the communication, or your organization suggests the communication and the candidate assents;
- (b) *Material involvement* – the candidate (or agent) “is materially involved in decisions regarding” the communication’s (i) content, (ii) audience, (iii) means or mode, (iv) specific media outlet, (v) timing and frequency, or

- (vi) size, prominence, or duration;
- (c) *Substantial discussion* – “[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between” your organization and the candidate. “A discussion is substantial . . . if information about the candidate’s . . . campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication. This rule does not apply where the information “material” to the creation, production or distribution of the advertisement was “obtained from a publicly available source”;
- (d) *Common vendor* – your organization uses the same commercial vendor to create your communication that the candidate used within the previous 120 days to develop media strategy, do polling or fundraising, develop the content of public communications, produce public communications, identify voters and develop lists, select personnel, consult or otherwise provide political or media advice and that vendor conveys information to you about the candidate’s plans and needs or uses material information obtained from the candidate to create your communication. An exception to this conduct standard occurs when a commercial vendor creates a firewall by written policy distributed to all relevant employees and consultants prohibiting the flow of information between those persons providing services to your organization and persons providing services to the candidate identified in your communication;
- (e) *Former employee or independent contractor* – the candidate had an employee or independent contractor within the previous 120 days who is now an employee of your organization and that employee/contractor provides material information about campaign plans and needs or uses information obtained in working for the candidate to create and produce your communications. An exception to this conduct standard occurs when a political committee creates a firewall by written policy distributed to all relevant employees and consultants prohibiting the flow of information between those persons providing the services and the former employee of the candidate identified in the communication;
- (f) *Dissemination, distribution, or republication of campaign material* – you

distribute or republish a candidate's campaign material;<sup>6</sup> or

- (g) *Agreement or formal collaboration* – mutual agreement between you and a candidate is not required for a coordinated communication, but if you have it then you have made an in-kind contribution.

*Safe Harbor.* The “coordinated communication” definition sets up a safe harbor for legislative or policy inquiries: “A candidate’s . . . response to an inquiry about that candidate’s . . . positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards . . . .”

In general, you will want to avoid discussing with candidates their campaign plans or needs, your plans and future activities, hiring people who worked with a candidate in the same election cycle, and using common vendors. But using the safe harbor provision, you will still be able to ask candidates to respond to questionnaires about legislative and policy issues to lobby and prepare voter guides.

### **Item (8). Electioneering Communications regarding Federal Candidates**

As explained above, corporations and labor unions may now make “electioneering communications,” defined as broadcast, cable or satellite communications: (1) that refer to a “clearly identified (federal) candidate”; (2) that are “publicly distributed” within 30 days of a primary election, caucus or nomination convention, or within 60 days of a general election; and (3) that are “targeted to the relevant electorate” for those federal candidates identified in the communication. Corporations income tax exempt under IRC 501(c)(3) may only make electioneering communications that are not “political expenditures.” See Rev. Rul. 2004-6. Specific legal advice is required. Election communications must be reported to the FEC if over \$10,000, using FEC Form 9, and must contain a required disclaimer.

### **Item (9). State Referendums.**

501(c)(3) and (c)(4) organizations may make expenditures in connection with state referendums, including making a contribution to a referendum effort. Any such expenditure is considered direct lobbying and all lobbying by a 501(c)(3) organization must be insubstantial. In addition, state campaign finance laws should be consulted for any requirements imposed on state

---

<sup>6</sup>FEC regulation 11 CFR § 109.22 provides the following relevant exceptions to the rule about disseminating or republishing candidate campaign materials. There is no coordination if the campaign material is (a) “incorporated into a communication that advocates the defeat of the candidate . . . [who] prepared the material”; (b) used “in a news story, commentary, or editorial”; or (c) “consists of a brief quote or material that demonstrates a candidate’s position as part of [an organization’s] expression of its own views . . . .”

referendum activities.

**Item (10). Payment of Delegate Expenses.**

No corporation, except a PAC, may contribute to or pay the expenses of a candidate for or an elected delegate to any convention or caucus which will lead to the selection of delegates to a national nominating convention or for a delegate to a national nominating convention itself. If a 501(c)(4) is not a corporation, however, it may, without limitation, contribute to or pay the expenses of a candidate for or an elected delegate to any convention. A 501(c)(3) is prohibited from making such an expenditure, and a PAC may do so without limitation.

**Item (11). Payment of Administrative Expenses of PAC.**

A 501(c)(4), but not a 501(c)(3), may pay the administrative expenses of a PAC connected with it (a connected PAC). These expenses are things such as phone, rent, salaries and fundraising costs. Administrative expenses do not include Items (2) - (8). The 501(c)(4) organization may pay the administrative expenses directly or, under federal law, reimburse the PAC for them within 30 days.

**Item (12). Appearance of Political Candidate at Meeting.**

A political candidate may appear at a meeting of a 501(c)(3), 501(c)(4), or PAC. The appearance of a candidate before a meeting of a 501(c)(3) is limited as follows:

- (1) All legally qualified candidates should be invited;
- (2) The questions should be prepared and presented by an independent nonpartisan panel;
- (3) The topics discussed should cover a broad range of issues of interest to the public;
- (4) Each candidate should have an equal opportunity to present his or her views on the issues discussed; and
- (5) The moderator should not comment on the questions or otherwise make comments that imply approval or disapproval of the candidates.

However, public officials, who are also candidates, may be invited to speak to a 501(c)(3) as a public official, without complying with the above requirements, if no reference is made to the public officials candidacy, if the public official speaks only in her capacity as a public official, and if there is no campaign activity in connection with the public official's appearance.



In addition, a 501(c)(3) organization may allow candidates to use its facilities for meetings or campaign appearances on the same basis as other civic groups are allowed to do so. If other civic groups are required to pay some rent for using the church property, the political candidate should be charged the same amount.

The appearance of a candidate before a meeting of a 501(c)(4) is limited as follows:

- (1) Any other candidate for the office, or any other political party who has a candidate for the office, who requests to appear, must be given the same opportunity, and
- (2) No solicitation for funds for the candidate may be made, and a representative of the group may not endorse the candidate.

*Fundraising Events:* Federal law limits the ability of federal candidates to attend, speak, or appear as featured guests at fundraising events for tax exempt organizations. A federal candidate or officeholder may make a general solicitation on behalf of a tax-exempt organization, without limits on the source or amount of funds, if the organization does not make expenditures or disbursements in connection with federal elections. The rule permits solicitations for organizations that conduct activities in connection with a federal election, but only if election activities are not its principal purpose, and the solicitation is not for election activities. 11 CFR § 300.65(a) and (c). The rule also permits a federal candidate to solicit for those organizations whose principal purpose is to do nonpartisan voter registration within 120 days of an election, and voter identification, get-out-the vote or other generic campaign activity conducted in connection with an election, as long as such solicitations are only made to individuals and are limited to \$20,000 during any calendar year. 11 CFR §§ 300.65(b) and (c).

An appearance of a federal candidate at a meeting of a PAC, however, is not so limited. In addition, any of these three groups may give an honorarium to a candidate for his appearance up to \$2,000.00 plus expenses.

### **Item (13). Voter Guides.**

Organizations exempt under 501(c)(3) and (c)(4) may publish the result of surveys of candidates on public issues (often called “voter guides”). Voter guides should not include an endorsement of a candidate or expressly advocate the election or defeat of any candidate. Further, voter guides should not include advocacy of voting for candidates who support particular issues, i.e., single issue voting.

For 501(c)(3) groups, surveys should conform to the following guidelines:

- (1) Questionnaires should be sent to all candidates;

- (2) All responses should be published;
- (3) The questions should cover a wide variety of issues;
- (4) The questions should not indicate a bias toward the organization's preferred answer;
- (5) The candidate's responses should not be compared to the organization's preferred answer;
- (6) The responses should be published in the candidate's own words or in a neutral, unbiased and complete summary of the candidate's position; and
- (7) The survey should not be published under the direction or control, direct or indirect, of any candidate.

501(c)(4) groups have a lot more leeway with publishing voter guides. 501(c)(4) groups should observe the following conditions in publishing the survey:

- (1) The survey can indicate the desired response. Thus, a survey would use "+" and "-" or "pro-life" and "anti-life" to indicate the candidate's response to the question. In addition, there can be a discussion of the issues involved, including your position in it;
- (2) The survey should not be published under the direction or control, direct or indirect, of any candidate.

There is no limitation on the publication of candidate surveys by PACs.

#### **Item (14). Voting Records.**

501(c)(3) and 501(c)(4) groups may also publish the voting records of incumbent public officeholders. The voting record may indicate a 501(c)(4) organization's view on the issues presented but should not endorse any candidate or expressly advocate the election or defeat of any of the public officials involved.

501(c)(3) organizations should observe the following guidelines:

- (1) Incumbent's positions should not be compared to the positions of other candidates or the organization's position;
- (2) The voting record should be distributed on a regular basis, not just at election

time;

- (3) The voting record should be broadly distributed to the general public, not targeted to certain voting blocks;
- (4) A variety of issues of interest to the general public should be presented.

There is no limitation on the publication of voting records by PAC's.

#### **Item (15). Voter Education.**

501(c)(3) and (c)(4) groups may participate in non-partisan voter education. Here, voter education involves discussion of the electoral process, such as how to run for public office or delegate, how to register, where to vote, helping or assisting people to register, and get out the vote drives. All of these activities are permissible as long as they are not directed at supporters of one particular party or candidate over another.

There is no restriction on PAC voter education activities.

#### **Items (16), (17) and (18). Nonpartisan Voter Registration, Nonpartisan Voter Identification, and Nonpartisan Get Out the Vote Activities**

501(c)(3) and (c)(4) groups may participate in nonpartisan voter registration, voter identification and get out the vote activities. To be nonpartisan, these activities may not be directed at the supporters of any particular candidate or political party. 501(c)(3) and (c)(4) organizations may, however, direct these activities at certain groups using nonpartisan criteria, such as organization membership, geographic location or position on certain issues.

501(c)(4) groups may distribute literature praising or criticizing particular candidates or political parties for their positions on issues, when conducting these activities. 501(c)(3) groups should not.

PACs may engage in partisan voter registration, voter identification and get out the vote activities. These may be directed at supporters of a particular candidate or political party. If these activities are coordinated with a candidate, they are an in-kind contribution to the candidate and subject to any applicable contribution limits. If done independent of any candidate or political party, they are an independent expenditure, not subject to contribution limits.

#### **Item (19). Lobbying for Legislation**

501(c)(3)'s that have not made a 501(h) election may spend an insubstantial amount of their funds yearly on direct and grassroots lobbying. An insubstantial amount is generally

considered 5 to 15 percent of a 501(c)(3)'s total expenditures. Those 501(c)(3) organizations that have made a 501(h) election have total lobbying and grassroots lobbying limits as described in 501(h). Lobbying is of two types: (1) direct lobbying, which involves direct communications with governmental officials regarding legislative or executive action, and (2) grass roots lobbying, where the 501(c)(3) communicates with its members or the general public urging them to contact governmental officials in support or in opposition to legislative or executive action. As a result, a 501(c)(3) may discuss legislative issues, support or oppose legislation, encourage its members or the general public to support or oppose legislation, and support other organizations with their lobbying efforts. Furthermore, 501(c)(3) organizations may lobby candidates on their positions on issues and distribute educational material to candidates or at political events, as long as this is being done to get out the organization's message and not to assist any candidate.

A 501(c)(4) is unrestricted in its ability to lobby for legislation. In contrast, 501(c)(3) groups and PACs may only spend an insubstantial amount of their funds for lobbying purposes. PACs are subject to a federal tax on lobbying expenditures.

### **Item (20). Distribution**

#### **a. Candidate Materials**

501(c)(3)s and 501(c)(4)s should not distribute candidate literature because, as discussed in Item 2, distribution of candidate materials is a form of political intervention forbidden to 501(c)(3) organizations and limited to 501(c)(4) organizations. PACs may do so, but, if the PAC expends its own funds to reproduce a candidate's literature, it is considered an in-kind contribution to the candidate and subject to contribution limits.

#### **b. 501(c)(4) Voter Guides**

501(c)(3)'s may not distribute 501(c)(4) Voter Guides at the 501(c)(3)'s expense.

### **Item (22). Newsletter Publication of Certain Items**

#### **a and b. Political Ads**

A newspaper published by any of the three groups may publish an ad for a political candidate, as long as the ad is purchased at the regular rate for such ads published in that newsletter. If discounts are given to regular advertisers under certain circumstances the same discounts shall be extended to the political advertiser. In addition, 501(c)(3) organizations may accept paid political advertising provided the advertisement is identified as paid political advertising; the organization expressly states that it does not endorse the candidate; and advertising is solicited from all candidates on an equal basis. Paid political advertising will generate taxable unrelated business income for the 501(c)(3) organization that must be reported

to the IRS on Form 990-T if in excess of \$1,000.00.

Only a PAC may publish an ad from a candidate in its newsletter at less than the normal rate, but if it does, the difference between the normal rate and the special rate would be an in-kind contribution to the candidate, subject to applicable contribution limits.

#### **c and d. News Stories and Editorials**

A newsletter may publish without limitations news stories on political candidates and political campaigns, the positions of candidates on issues, and endorsements of political candidates by political organizations. In addition, a newsletter published by a 501(c)(4) organization which qualifies for the “media exemption”<sup>7</sup> is exempt from the FEC disclaimer and reporting requirements for independent expenditures. Otherwise, the 501(c)(4) may publish editorials or commentaries endorsing or expressly advocating the election or defeat of federal candidates, but must comply with all FECA disclaimer and reporting requirements for independent expenditures. Newsletters endorsing or expressly advocating for state candidates must comply with state law. Specific legal advice is required. A newsletter published by a 501(c)(3), however, may not publish such an editorial or commentary. There are no limits on newsletters published by PACs.

The publication of voting records and candidate surveys in newsletters is subject to the limitations delineated in Items (13) and (14).

In addition, care should be exercised in publishing articles about an internal federal political action committee. A connected PAC may only solicit the members of its connected 501(c)(4) organization for contributions. Thus, no reference should be made to the fundraising activities of a connected PAC in a newsletter, because this reference could be interpreted as soliciting non-members for a contribution to the PAC.

---

<sup>7</sup>To qualify for the “media exemption,” the newsletter must be (1) published regularly, (2) to a regular group of subscribers, (3) by a regular staff and (4) look like a newspaper. The edition in question should only go to the regular subscription list. If there are any variations in compliance with these requirements, the publication will not be eligible for the exemption and would be treated like any other paid communication.