



# It's Campaign Season: What Can Non-Profits Do?

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# Topics

- Federal campaign finance law applicable to all incorporated non-profit organizations.
- Tax laws that apply depending on whether the organization is tax-exempt pursuant to:
  - I.R.C. 501(c)(3) or
  - I.R.C. 501(c)(4)/(6).

# Federal Campaign Finance Law

- Federal campaign finance law places restrictions on all incorporated organizations.
  - These include for-profit and non-profit corporations, and
  - Incorporated tax-exempt organizations like 501(c)(3) charities, 501(c)(4) social welfare organizations, and 501(c)(6) trade associations.
- Note that this portion of the presentation addresses the campaign finance law restrictions at the federal level. State and local campaign finance laws must be consulted when participating in state and local elections.

# Federal Campaign Finance Law: Prohibition

- As a general matter, federal campaign finance law prohibits the use of corporate resources in connection with federal elections.
- In particular, a corporation may not contribute its funds directly to:
  - Political candidates
  - Political parties registered with the Federal Election Commission (“FEC”)
    - The RNC, DNC, NRSC, DSCC, NRCC, and DCCC, and
    - The federal account of any state or local party.
  - Other political committees registered with the FEC
    - Leadership PACs maintained by Members of Congress, and
    - Other non-connected PACs (e.g., Act Blue, Emily’s List, BIPAC).

# Federal Campaign Finance Law: Prohibition

- A corporation also may not use its resources to facilitate contributions to the foregoing entities. This includes:
  - Facilities and resources for fundraising events (e.g., rooms and administrative staff);
  - Communications (e.g., newsletters, intranet postings, emails); and
  - Resources to make contributions (e.g., stamps, envelopes, staff to collect and send “bundled” contributions).

# Federal Campaign Finance Law: Exceptions

- Various exceptions have been created by statute, regulation, and caselaw.
  - Operate a PAC.
  - Make campaign or fundraising communications to the “restricted class.”
  - Host campaign or fundraising events for the “restricted class.”
  - Make independent campaign or fundraising communications to the public (*Citizens United v. FEC*).
  - Use of corporate resources for other limited purposes.

## Operate a PAC

- A PAC is a bank account into which a corporation solicits contributions of up to \$5,000 from certain eligible persons and makes contributions – subject to limits – to federal candidates, parties, and committees.
- Corporate resources may be used to establish, fundraise for, and administer a PAC.



# Campaign and Fundraising Communications to the “Restricted Class”

- The “restricted class” includes certain high-level employees of the organization as well as qualifying members.
- A corporation may use its resources to communicate campaign support – including fundraising support – to its “restricted class.”
- May not:
  - Republish campaign materials (e.g., campaign literature, contribution solicitations, or contribution reply cards).
  - Facilitate contributions by including envelopes or stamps or permit other corporate resources to be used to make contributions.

## Campaign and Fundraising Events for the “Restricted Class”

- May use corporate funds and resources to host an event for a candidate to which only the “restricted class” is invited.
- Corporation may express campaign and fundraising support for the candidate and need not provide an equal opportunity for the candidate’s opponent.
- May not:
  - Republish campaign materials (e.g., campaign literature, contribution solicitations, or contribution reply cards).
  - Facilitate contributions by including envelopes or stamps or permit other corporate resources to be used to make contributions.

## Campaign and Fundraising Communications to the Public

- On January 21, 2010, the Supreme Court in *Citizens United v. FEC* struck down the federal statutory prohibition on corporate-funded political speech that publicly advocates the election or defeat of a federal candidate.
- These are called “independent expenditures.”
  - May not be coordinated with political candidates and parties;
  - Must be reported to the FEC; and
  - Include certain disclaimer information.

# Campaign and Fundraising Communications to the Public

- *Citizens United v. FEC* also struck down the federal statutory prohibition on corporate-funded “electioneering communications” which are TV or radio ads that merely refer to a candidate within 30 days of a primary or 60 days of a general election and are targeted to the relevant electorate.
- Like “independent expenditures,” “electioneering communications”
  - May not be coordinated with political candidates and parties;
  - Must be reported to the FEC; and
  - Include certain disclaimer information.

## Use of corporate resources for other limited purposes

- Any other use of corporate resources for political activities (e.g., facilities, catering, transportation, employee time) must be paid for, often in advance by:
  - The campaign, or
  - By an individual or PAC and treated as an in-kind contribution (subject to the appropriate contribution limits) to the campaign.

## Use of corporate resources for other limited purposes

- Exceptions include:
  - Food, travel, and lodging expenses of employees to attend an event for which the PAC has made a contribution.
  - Employee time that does not exceed 1 hour per week or 4 hours per month to conduct “volunteer” political activities that do not increase overhead expenses.
  - Meeting rooms that are available to non-political clubs, civic or community organizations and made available to any political organization on the same terms.

# Tax Rules for 501(c) Organizations

- Common Types of Tax-Exempt Organizations
  - 501(c)(3): Charitable Organizations
    - Organized and operated for religious, charitable, scientific, or educational purposes
      - Two types of (c)(3)'s: Publicly Charities, and Private Foundations
  - 501(c)(4): Social Welfare Organizations
    - Operated primarily for the promotion of social welfare (i.e. society as a whole)
  - 501(c)(6): Business Leagues / Trade Associations
    - Operated primarily to promote the common business interests of its members

## 501(c) Organizations (cont'd)

- In general, the rules on **lobbying** and **political** activities are the same for 501(c)(4) and 501(c)(6) orgs, but they are different from the rules for 501(c)(3) organizations.



# 501(c)(3) Organizations – Political Activities

## ■ Political Activities

- May not “participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.”
  - May not endorse or contribute to candidates
  - Prohibition is absolute
    - Violations: Excise Taxes and Revocation

## 501(c)(3) Organizations – Political Activities (cont'd)

- Permissible Activities
  - **Voter Education** and **Voter Registration/GOTV** efforts
  - Must be conducted in a nonpartisan manner, without showing a bias or preference for or against any candidate or political party

# 501(c)(3) Organizations – Political Activities (cont'd)

## ■ Voter Education

- Voter Guides: Format, Content, Distribution must be nonpartisan
  - *Incumbent Voting Records:*
    - Timing: Election Season / Legislative Session
    - Regular Activity: compare voting record to organization's position on issues
    - Should not reference candidates, or endorse or reject an incumbent
  - *Candidate Questionnaires:*
    - Should cover a wide variety of issues
    - Should include all candidates
    - Should include responses without editorial comment (no grading)

Note: Similar Analysis for *Candidate Forums*

## 501(c)(3) Organizations – Political Activities (cont'd)

### ■ Voter Registration / Get-out-the-vote

- Nonpartisan
- Should identify all candidates or no candidates
- Communication should be limited to
  - Encouraging or assisting with registration and voting
  - Providing hours and places for registration and voting
- Should use neutral and nonpartisan criteria for selecting areas and groups to target.
  - For example, can target areas/groups that typically are underrepresented, but should not target areas/groups based on historical voting

# 501(c)(3) Organizations – Lobbying Activities

## ■ Lobbying Activities

- 501(c)(3) Public Charities may engage in a limited amount of lobbying activities
  - 501(c)(3) Private Foundations may not lobby
- Two tests:
  - **Substantial Part:** Subjective facts and circumstances test. IRS will consider expenditures, volunteer time, and other factors.
  - **501(h) Election:** A 501(c)(3) public charity can make a “501(h) Election” – an objective test, based solely on the amount of money spent on lobbying activities.

# 501(c) Organizations – Lobbying Activities (cont'd)

## ■ 501(h) Election: Expenditures

Exempt Purpose Expenditures (EPE)	Permissible Total (Direct + Grassroots) Lobbying Expenditures	Permissible Grassroots Lobbying Expenditures
Up to \$500,000	20% of EPE (up to \$100K)	5% of EPE (Up to \$25K)
\$500,000 - \$1,000,000	\$100K + 15% of EPE over \$500K	\$25K + 3.75% of EPE over \$500K
\$1,000,000 – \$1,500,000	\$175K + 10% of EPE over \$1M	\$43,750 + 2.5% of EPE over \$1M
\$1,500,000 - \$17,000,000	\$225K + 5% of EPE over \$1.5M	\$56,250 + 1.25% of EPE over \$1.5M
Over \$17,000,000	\$1,000,000	\$250,000

# 501(c)(4) and 501(c)(6) Organizations

- Lobbying Activities
  - Lobbying can be the organization's primary activity, provided it is related to exempt purpose.
- Political Campaign Activities
  - An organization can engage in political activity, provided it is not the *primary purpose*.

## 501(c)(4) and (c)(6) Organizations (cont'd)

### ■ Political Activities

- 60/40 Rule: No more than 40% of expenses can be spent on political campaign purposes.
  - Not a Safe Harbor, but ...
  - IRS Letter 5228: IRS has issued letters to certain 501(c)(4) applicants granting expedited approval of tax-exemption if the org certifies that less than 40% of expenses (and time) will be for political campaign activities.
- 501(c)(4) and 501(c)(6) organizations may not give directly to candidates or coordinate expenditures with candidates.



## 501(c)(4) and (c)(6) Organizations (cont'd)

### ■ Donations – Deductibility

- IRC 162: Ordinary and Necessary Business Expense
  - 501(c)(4): Usually no
  - 501(c)(6): Usually yes
    - In all cases, non-deductible to the extent used for **lobbying** or **political** activities.

# 501(c)(4) and (c)(6) Organizations (cont'd)

## ■ Donations – Notices

### • Notices to All Donors

- 501c4 and 501c6 organizations must notify all donors that contributions are not deductible as charitable contributions.

- *“Contributions to [Name of Organization] are not tax deductible as charitable contributions.”*

### • Notices to Members:

- Organizations with members must notify members that dues (and other similar payments) are not deductible to the extent used for lobbying/political activities.
- Notice must include a reasonable estimate of the amount allocated to lobbying/political activities.

- *“We estimate that the non-deductible portion of your dues is \_\_%”*

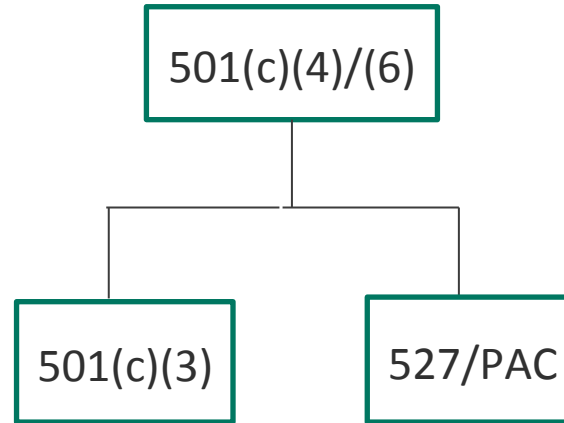
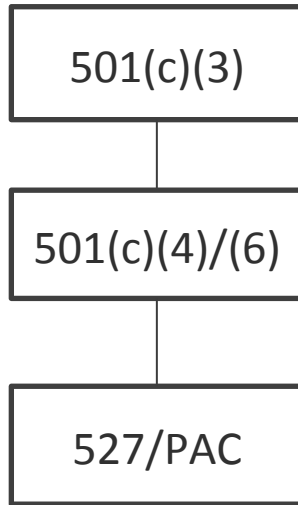
- Organizations that do not provide the notice will be subject to proxy tax on lobbying and political expenses.

# Affiliation

- Affiliated Political Organization
  - A 501(c) org may want to affiliate with other organizations, including with a political organization (527/PAC)
  - 527s/PACs can engage entirely in political campaign activities
  - 527s/PACs are subject to disclosure/reporting requirements
  - 501(c)(3) organizations may not establish a PAC directly

# Affiliation

- Common Affiliated Structures



# Affiliation

- Important for affiliated organizations to operate as separate entities – books, records, bank accounts
  - Can have overlapping directors
- The organizations may share resources (e.g., facilities, employees, etc.), but must allocate expenses
  - Sharing Agreement between the organizations
  - Reasonable and consistent allocation method – e.g., time sheets for employees

# Practical Application

- Senator Smith requests a campaign contribution.
  - Campaign finance law:
    - Cannot use corporate funds, but can use PAC funds.
    - Personal contributions permissible assuming no use of corporate resources.

# Practical Application

- Senator Smith requests a campaign contribution.
  - Tax law:
    - A 501(c)(3) entity may not contribute to a candidate.
    - If the candidate is non-federal and the applicable jurisdiction permitted corporate contributions, then a 501(c)(4)/(6) could contribute, but the contribution would be political campaign activity and count towards its 40% limit.

# Practical Application

- You want to hold a campaign/fundraising event for Senator Smith.
  - Campaign finance law:
    - If the audience is limited to the “restricted class,” then corporate funds and resources can be used to plan and administer the event.
    - If the audience is broader, then the campaign must pay for the use of corporate resources (or an individual or PAC can pay and treat the payment as an in-kind contribution).



# Practical Application

- You want to hold a campaign/fundraising event for Senator Smith.
  - Tax law:
    - A 501(c)(3) may not host this type of event.
    - A 501(c)(4)/(6) could host this type of event; it would be political campaign activity and count towards its 40% limit.
    - See previous discussion regarding non-partisan “all-candidate” events that could qualify as non-political.

# Practical Application

- You want to communicate campaign support for Senator Smith.
  - Campaign finance law:
    - If the audience is limited to the “restricted class,” then corporate funds and resources can be used to make the communication.
    - If the audience is broader, then the communication must be made independently of the campaign and subject to reporting at the FEC.

# Practical Application

- You want to communicate campaign support for Senator Smith.
  - Tax law:
    - A 501(c)(3) may not communicate campaign support for a candidate.
    - A 501(c)(4)/(6) can communicate campaign support for a candidate; it would be political campaign activity and count towards its 40% limit.

# Practical Application

- You want to communicate policy support for Senator Smith.
  - Campaign finance law:
    - If publicly distributed by TV or radio to constituents within 30 days of a primary or 60 days of a general election, then it will be considered an “electioneering communication” and must be conducted independently of the campaign and subject to reporting at the FEC.

# Practical Application

- You want to communicate policy support for Senator Smith.
  - Tax law:
    - A 501(c)(3) may communicate support for Senator Smith with respect to policy or legislation; however such communication may be considered “lobbying” (must be insubstantial; but see 501(h) election).
    - A 501(c)(4)/(6) organization may communicate policy or legislative support for a candidate without limitation.
    - BUT ... if the communication is an “electioneering communication” (referring to a candidate 30/60 days before an election) it likely will be considered a political communication – i.e., prohibited for a 501(c)(3), and will count against the 40% political bucket for 501(c)(4)/(6), particularly if the communication is isolated/targeted and not part of an ongoing campaign.

# Practical Application

- You want to disseminate a voter guide brochure that explains the candidates' positions on issues.
  - Campaign finance law:
    - If the voter guide does not expressly advocate any candidates' election or defeat and is not coordinated with a candidate, then not restricted by campaign finance law.

# Practical Application

- You want to disseminate a voter guide brochure that explains the candidates' positions on issues.
  - Tax law:
    - A nonpartisan guide of incumbent voting records that does not express support or opposition for a candidate may be non-political, particularly if it is part of an organization's regular, ongoing activities.
    - A nonpartisan questionnaire of candidates positions on issues that includes all candidates, on a wide variety of issues, without editorial bias may be non-political.
    - If deemed non-political, all 501(c) organizations may disseminate. If deemed political, 501(c)(3) orgs may not distribute; 501(c)(4)/(6) orgs may distribute but it will count against the 40% political limit.

# Practical Application

- You want to encourage people to vote or register to vote.
  - Campaign finance law:
    - If the communications do not expressly advocate any candidates' election or defeat and are not coordinated with a candidate, then not restricted by campaign finance law.



# Practical Application

- You want to encourage people to vote or register to vote.
  - Tax law:
    - If nonpartisan, refers to no candidates or all candidates, and the selection criteria is neutral (i.e., not targeted based on historical voting record), then GOTV/voter registration activity may be non-political.
    - If deemed non-political, all 501(c) organizations may engage in this activity. If deemed political, 501(c)(3) orgs may not distribute; 501(c)(4)/(6) orgs may distribute but it will count against the 40% political limit.

# Questions



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