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When associations begin thinking about becoming politically active, the most common thought is: "Let's start a PAC." A separate segregated fund, the technical term for a political action committee, is certainly one way for an association to become more involved in the political process. But there are a number of other things associations can do politically that may be even more influential than simply starting a PAC. For example, an association may sponsor a fundraiser for a candidate, make endorsements, host candidates at member events, communicate its political preferences to its membership, and communicate with the public in a variety of ways. For some of these activities, a PAC is an essential component; for others, no PAC is required.

The issue for associations, as well as other corporations, is that the Federal Election Campaign Act ("FECA") prohibits corporations from giving contributions to candidates. These broad prohibitions include facilitating the making of contributions and giving anything of value to a federal candidate or political party. Fortunately, there are a number of exceptions from these categorical prohibitions that make political activity possible, but only if it is carefully structured.

Moreover, the Internal Revenue Code ("IRC") imposes other restrictions on the activities of associations, or at least may cause less-favorable tax treatment if the political activity is not undertaken carefully. It is well-known that 501(c)(3) organizations may not engage in any political activity. 501(c)(4) and 501(c)(6) organizations may engage in political activity, but not if the political activity comprises the organization's "primary activity." If it does, then the IRS could revoke the organization's exemption. Although this is a relatively rare occurrence, the IRS has indicated that it plans to increase scrutiny of 501(c)(6) and 501(c)(4) political activity. At the same time, if the association does not channel its political activities through a segregated fund (not necessarily a PAC), it will be subject to taxation on its political activity or investment income.

This article is designed to help associations think about five different kinds of political activity available to 501(c)(4) and 501(c)(6) organizations. It gives some initial guidance in structuring these activities, but it is by no means a comprehensive treatise on campaign finance law. Organizations interested in these activities are encouraged to seek additional advice. In addition, this article focuses on federal law. Some states allow corporations to engage in a wider range of political activity and others impose additional restrictions; associations that are interested in state and local political activities should consult the applicable state laws and regulations.

With that, this article presents five different strategies for associations to become involved in the political process.

## 1. Create a PAC

For many associations, the first question – "how do we create a PAC?" – becomes their primary political focus for years to come. A PAC is an incredibly useful tool, and often necessary for more complicated forms of political activity.

A PAC is a separate segregated fund that contains contributions from individuals. Under the FECA, individuals may give no more than \$5,000 per year to any one PAC. Established, "multicandidate" PACs may then give up to \$5,000 per election to candidates for federal office (primaries and general elections are counted separately). New, non-multicandidate PACs are subject to a lower contribution limit – \$2,300 for the first six months of its operation, and until it has made contributions to five candidates and received contributions from 50 different people.

### A. PAC Expenses/Organization

One advantage of an association-created PAC is that an association may use its corporate resources to pay for the costs of solicitation and administration of the PAC. In addition, the Federal Election Commission ("FEC") has held that an association's corporate members may make contributions to the association that are earmarked to fund the PAC's administrative and fundraising activities.

An association may not, however, exchange its corporate funds for individual contributions. Accordingly, an association may not reimburse individuals for contributions or provide prizes or other gifts to donors that exceed one-third of the value of the contribution itself. This "one-third rule" is complicated enough to justify its own article. For the purposes of this overview, it is simply important to be aware of its existence and its application to certain donor-incentive programs.

Although it is a separate fund by definition, a PAC is run by an association. Association executives may provide time and services to a PAC without making any separate accounting of their time (although time spent working on the PAC will count toward the non-deductible portion of their time for member dues purposes). Many associations do create some form of PAC committee or board to provide oversight and governance for the PAC. Finally, all PACs must have a treasurer – one individual who is legally responsible for the PAC's compliance. It is generally a good idea to have a full-time staff person serve in this role, and not a volunteer.

## B. PAC Contributions

The FECA does not restrict who may give to a PAC, but it does restrict whom an association may ask for a contribution. Specifically, the FECA allows a corporation – including an association – to solicit contributions to a PAC only from its restricted class. Who is in the restricted class? Like most subjects in the FECA, the answer depends on how the association is structured.

**Individual Members:** For associations with individual members, the restricted class is made up of those individual members, so long as the members are, in the eyes of the FECA, actually members. The scope of membership is discussed below.

**Corporate Members:** For those associations with corporate members, the restricted class includes the executive and administrative personnel of the member companies, as well as the shareholders of the member companies, and the families of both groups, as long as the member has given its prior written approval for the association to solicit its executives and their families and its shareholders and their families. Each corporate member may only give such approval to one association. The "prior approval" requirement is complicated and is subject to a number of other rules with which associations with corporate members must comply.

**Membership:** The FECA and its regulations define a "member" as any person that meets the association's membership requirements, and either pays dues or regularly participates in the governance of the organization. This test is designed to require a formal

connection to the organization; the organization cannot simply call people members and treat them as part of the restricted class.

Some organizations regularly interact with a wide range of people and corporations that do not pay dues or have actual membership rights – and therefore are not "members" in the eyes of the FECA. Such organizations may have a difficult time engaging in certain types of activities or creating a PAC. In fact, some organizations with very broad reach, but few actual members, have decided to allow individuals involved in the organization to create a "non-connected PAC." This approach allows the PAC to solicit whomever its leadership wants, but prohibits the association from staffing or paying for any part of its activities. For example, a non-connected PAC likely would have to pay fair market value for use of the association's mailing list.

The test for membership applies to both corporate and individual members (see above). This is important, because some organizations have both regular members and also associate members that are typically industry suppliers or others that provide support services to the organization's members. These associate members must satisfy the FEC's definition of "member" in order to fit within the restricted class.

## 2. Communicate with Members

The FECA distinguishes between corporate communications made to the general public and those made to the association's restricted class. While the FEC regulates communications made to the general public, associations are entitled to say almost anything within their restricted class.

As is the case for PAC solicitations, an association's restricted class is comprised of its members. Associations are free to communicate with their individual members on any political subject, including communications that expressly advocate the election or defeat of a clearly identified candidate for federal office. Thus, the association may issue communications urging members to vote for a candidate, invite a candidate to speak to members, and conduct voter registration and get-out-the-vote activities aimed at bolstering support for a particular candidate or political party. The association may even work with a candidate to design the message and arrange the event (known as "coordination" by the FEC).

An association is more limited when communicating with its corporate members. Instead of speaking directly to the executive and administrative personnel of the member corporation, as it may for PAC solicitations (with the necessary prior approval), the association may only communicate with the individuals at the member

companies with whom it regularly conducts its business. The company is, however, free to pass along the content of that communication within its own restricted class. In this manner, an association can act as an important hub for a candidate to communicate his or her message and to raise funds.

### 3. Communicate with the General Public

Communications with the public generally fit into one of three categories: pure issue advocacy, electioneering communications, and express advocacy for political candidates. In January 2010, the United State Supreme Court issued its landmark decision, *Citizens United v. FEC*, which dramatically changed how corporations, including 501(c)(4) and 501(c)(6) organizations, may communicate with the public. The Court struck down FECA's ban on "independent expenditures" and "electioneering communications" made by nonprofit and for-profit corporations. Before *Citizens United*, associations could engage in express advocacy or make electioneering communications only through their PACs.

As a result of the decision, corporations may fund these types of communications using general treasury funds. Following *Citizens United*, the D.C. Circuit Court struck down the FECA's contribution limits to independent expenditure committees, allowing individuals and both for- and nonprofit corporations to contribute unlimited funds to an organization for the purpose of making independent expenditures.

It is important to keep in mind that making electioneering communications and expenditures for express advocacy may trigger the FEC's reporting and disclosure requirements, which were upheld by the courts.

#### A. Issue Advocacy

At one end of the political communications spectrum is pure issue advocacy, which does not trigger the FEC's disclosure and reporting requirements. Such messages focus not on candidates or political parties, but on policy issues of concern to the association. Some messages may be focused on specific pieces of legislation; others, on broader policy questions. Of course, as the U.S. Supreme Court observed over 30 years ago in *Buckley v. Valeo*, "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." It is quite often difficult to effectively discuss a pressing political issue without making reference to the political standard bearers of those issues. For example, a grass-roots communication may urge people to call Senator X and tell her to vote against a particular bill. Suddenly, the otherwise issue-oriented piece could be subject the FEC's reporting and

disclosure rules because it mentions the name of a candidate.

#### B. Electioneering Communications

Mentioning a candidate at the wrong time can turn issue advocacy into an electioneering communication. Electioneering communications are certain communications that mention a candidate 30 days before a primary election or 60 days before a general election. Electioneering communications include only broadcast, cable, or satellite communications; they do not include internet, direct mail, or newspaper advertisements.

If the cost of an electioneering communication exceeds \$10,000, an association must disclose the identities of any individual or corporation that contributed more than \$1,000 for the express purpose of producing the communication to the FEC.

In addition, each electioneering communication must include certain specified disclaimers. The communications must provide a name and address (or web address) for the entity making the communication, state that the communication is not authorized by any candidate, and include the following audio statement: "\_\_\_ is responsible for the content of this advertising." If transmitted through television, this statement must also appear on screen in accordance with specifications set forth in FEC regulations.

#### C. Express Advocacy

Finally, at the other extreme of the political communications spectrum is express advocacy. Following *Citizens United*, associations may use their general treasury funds to expressly advocate the election or defeat of clearly identified candidates for federal office. Such communications, however, must be made independently of any candidate. If coordinated with a candidate, the cost of producing the express advocacy becomes an in-kind contribution to the candidate. Monetary or in-kind contributions by associations to candidates are still prohibited. "Coordination" is a broad and evolving standard and associations should be well-versed in the idea before undertaking an independent expenditure.

Expenditures for express advocacy must be reported to the FEC when they aggregate more than \$250 for an election. This includes information about the amount of the expenditures and information about contributors who gave more than \$200. If the independent expenditures exceed \$10,000, then reports must be filed with the FEC within two days of the expenditure (one day for expenditures that exceed \$1,000 made within 20 days of the election).

Independent expenditures must include disclaimers that are similar to those required for electioneering communications.

#### 4. Educate Voters

Before *Citizens United*, associations were required to conduct voter education activities in a strictly neutral fashion. Although the FEC has yet to revise its rules consistent with Supreme Court ruling, the law clearly permits associations to make independent expenditures in support of or in opposition to federal candidates. As explained above, associations may not coordinate these efforts with any political campaign. Associations still must ensure that political activity does not comprise their “primary activity.”

**Voting Guides:** Voting guides often contain the voting records of incumbent candidates and the positions taken by candidates on particular issues. Tax-exempt associations may publish voting guides that contain candidate positions on a broad range of issues. Following *Citizens United*, voter guides may include a scoring or ranking system.

**Get-out-the-Vote Activities:** An association may conduct voter registration drives and other get-out-the-vote activities aimed at the general public. Moreover, as a result of *Citizens United*, the association may expressly advocate the election or defeat of any clearly identified candidate or political party in connection with such activities.

**Candidate Forums:** Associations may host a series of candidate appearances for the general public. Candidates may ask for campaign contributions at such appearances and may leave campaign material or envelopes for members of the audience, but may not actually collect contributions at the event. These events often help to raise an organization's public and political profile – and the FECA explicitly permits the news media to be present.

#### 5. Raise Money for Candidates

Many associations think of their PAC as their only means of raising money for a campaign. In fact, there are several ways an association may show its support for its favorite candidates.

First, a PAC may host a fundraiser for a candidate and invite the general public (that is, not just the restricted class). Unlike fundraisers for the PAC, which can be funded by the connected association, the PAC – not the

association – must pay for the cost of fundraising events for candidates and treat the amount spent as an in-kind contribution. The cost of food, room rental, and invitations would all then count towards the PAC's \$5,000 contribution limit. The benefit to such an arrangement is that the association may be able to raise far more than just \$5,000 for the candidate.

Second, the association itself - and not just the PAC - may hold fundraising events for candidates, but only if the guest list is limited to the restricted class. An event funded by the association that includes individuals outside of the restricted class likely would cause the association to make a prohibited in-kind contribution to the candidate (which is why a PAC typically must pay for events open to non-members).

If the event is limited to the restricted class, then the association may pay for reasonable costs related to the event, and the association and the invited candidate may ask for contributions before (e.g., in an invitation or telephone call) and during the event. The key to this type of activity is that the candidate's staff – and not the association – must collect the contributions. Any use of the association's resources to collect or forward the money to the campaign will violate the FECA's prohibition on corporate facilitation of contributions.

Third, the association may "bundle" contributions by soliciting donations from its restricted class and forwarding them to candidates as a single package. However, in this situation, the contribution counts both toward the PAC's and the individual's contribution limits. Thus, the association will only be able to collect \$5,000 in contributions for the candidate, and these bundled contributions must reported to the FEC.

A well-crafted strategy, making use of the different tools suitable to different audiences, has great potential to bring an association's message to the political forefront. With so much at stake in this upcoming election season, associations may have no better time to jump into the fray.

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