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Public Policy and Politics:

Compliance Tips for Your Nonprofit's Advocacy and Electoral Efforts

April 16, 2013

12:30 PM – 2:00 PM EDT

Venable LLP

575 7th Street, NW

Washington, DC 20004

Moderator:

Jeffrey S. Tenenbaum, Esq.

Panelists:

Larry Norton, Esq.

Ron Jacobs, Esq.

Janice Ryan, Esq.

Presentation

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Public Policy and Politics: Compliance Tips for Your Nonprofit's Advocacy and Electoral Efforts

Tuesday, April 16, 2013

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Upcoming Venable Nonprofit Legal Events

May 14, 2013 - As Nonprofits Expand Their Global Reach, a Special Focus on Tax, Trademarks and the Foreign Corrupt Practices Act

June 25, 2013 - Employee Leaves of Absence and Other Employee Accommodations under the Law: What Every Nonprofit Needs to Know (details coming soon)

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Agenda

1. Growing Your PAC
2. Independent Expenditures
3. 501(c)(3) Election Issues
4. Lobbying Disclosure
5. Tax Issues
6. Hosting Events

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Political Action Committees

Why a PAC?

- Corporations still prohibited from making contributions to candidates
- Corporations prohibited from facilitating contributions
- *Citizens United* did not change this

Who funds a PAC?

Individual Membership Organization

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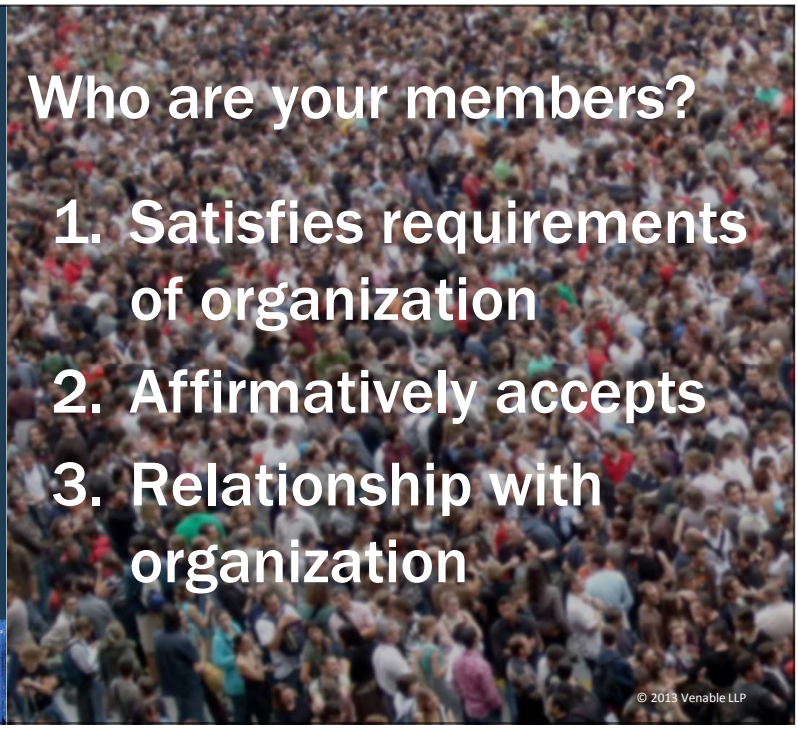
Who are your members?



1. Satisfies requirements of organization
2. Affirmatively accepts
3. Relationship with organization

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Relationship Prong

- Pays annual dues

OR

- Annual affirmation and participatory rights
  - ✓ Vote for board member
  - ✓ Vote for officers
  - ✓ Binding vote on policy
  - ✓ Approve budget

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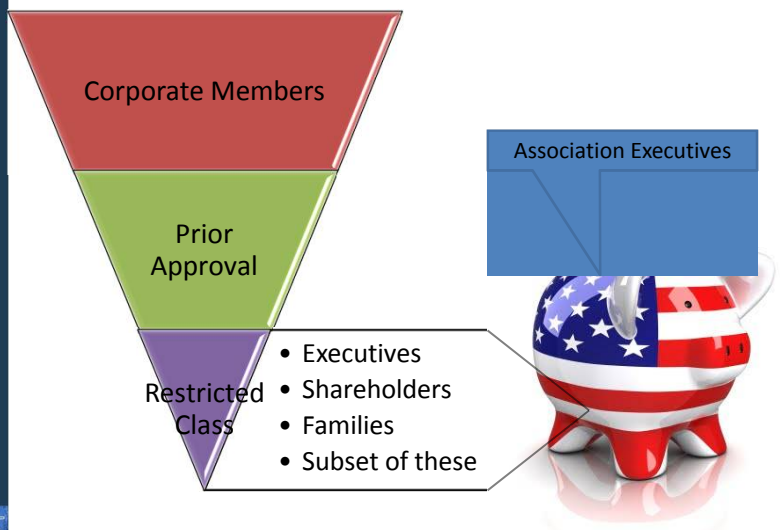
Who funds a PAC?



Corporate Membership Organization

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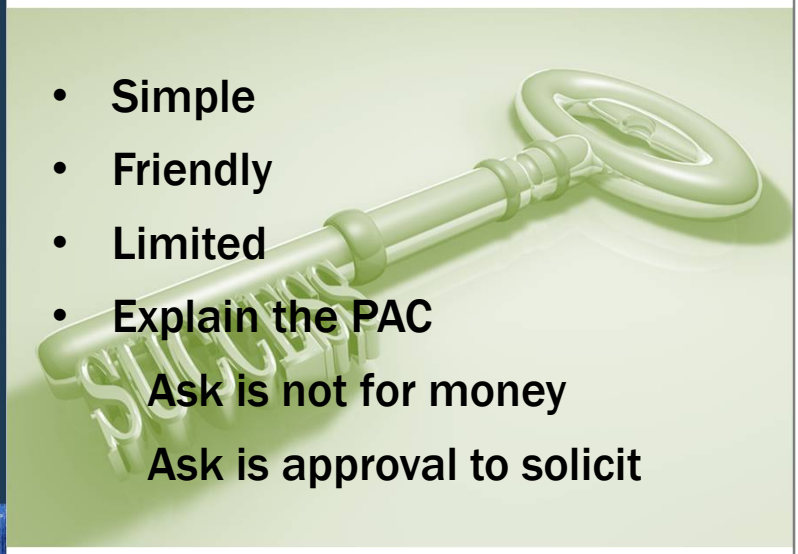
Prior Approval

- Written
- Signed for each year
- Only one association per year

Successful Prior Approval



- Simple
- Friendly
- Limited
- Explain the PAC
  - Ask is not for money
  - Ask is approval to solicit

Invitations to Events Conundrum

- If no prior approval, cannot invite to the event → solicitation
- Ask for prior approval to invite to event

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Events

7:30 pm PAC Reception, Ballroom

Invitation Only

Click here to learn about the PAC or call…

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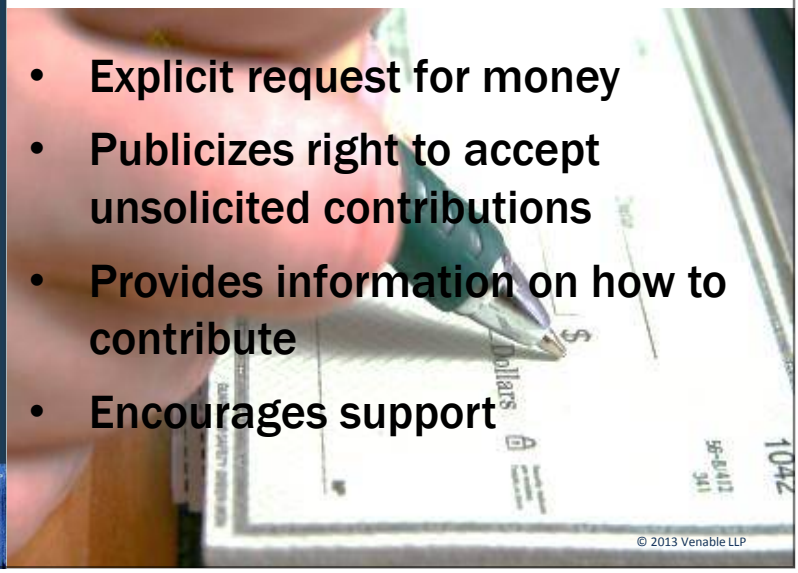
Tradeshows

What is a solicitation?

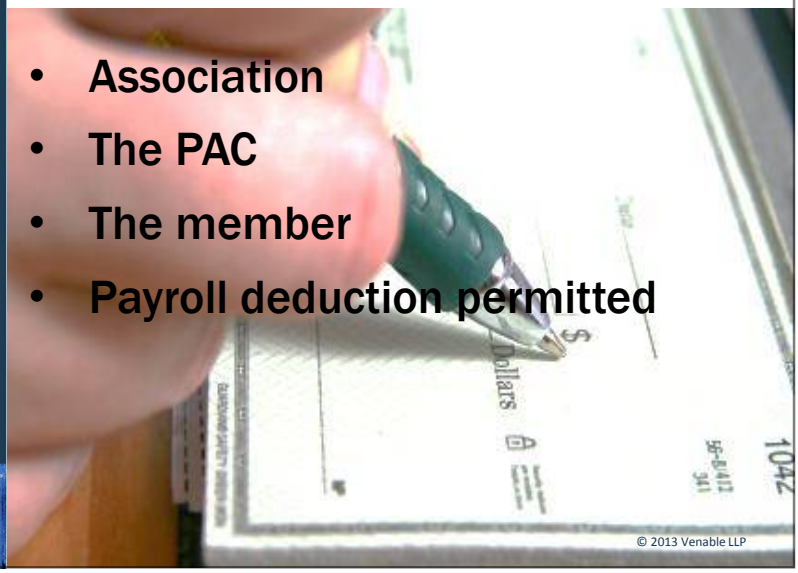


- Explicit request for money
- Publicizes right to accept unsolicited contributions
- Provides information on how to contribute
- Encourages support

What is a not a solicitation?

- Announce the existence of PAC
- Explain legal rules
- Information about receipts
- Information about disbursements

Making the Ask



- Association
- The PAC
- The member
- Payroll deduction permitted

PAC Administrative Costs

- Paid for by "connected organization"
- May accept donations from corporate members
  - "Administrative Fund"
  - Not for contributions to candidates

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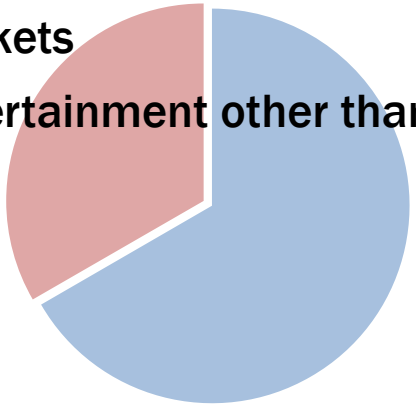
Incentives

- Drawings for prizes
- Trinkets
- Entertainment other than food



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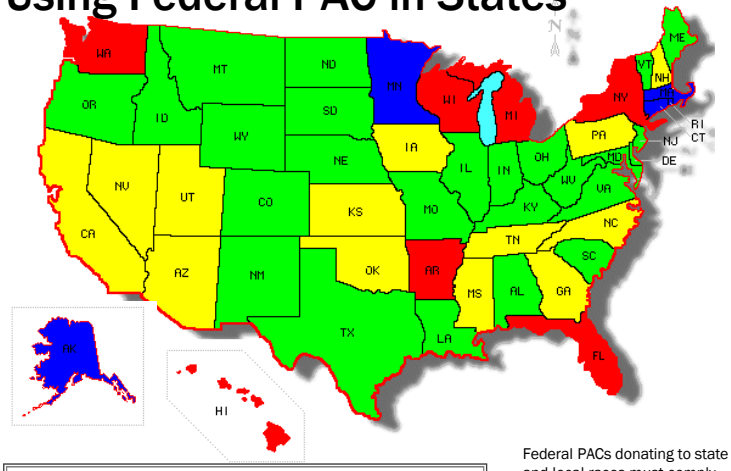
Using Federal PAC in States



- Easy: Minimal reporting using FEC reports
- Moderate: Must register federal PAC with state and report on state schedule
- Difficult: In-state bank/treasurer requirements, or limits on solicitation (in-state employees only) limit federal PAC giving
- Very Difficult or Prohibited: Federal PAC generally may not give to state candidates

Federal PACs donating to state and local races must comply with state-specific limitations on contributions and expenditures.

Note: Subjective judgments involved in ranking states

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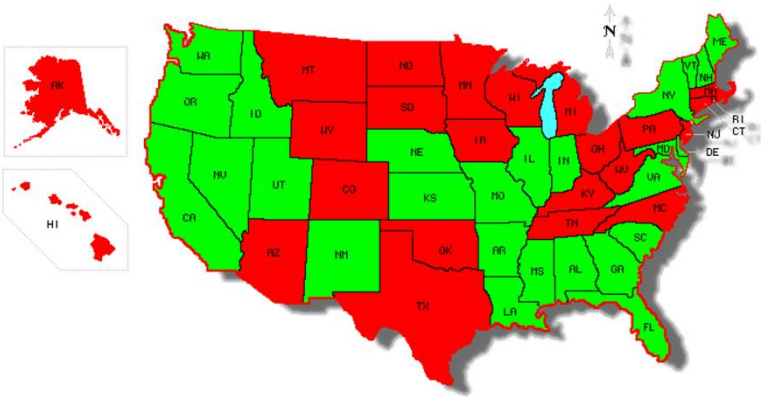
Corporate Campaign Contributions



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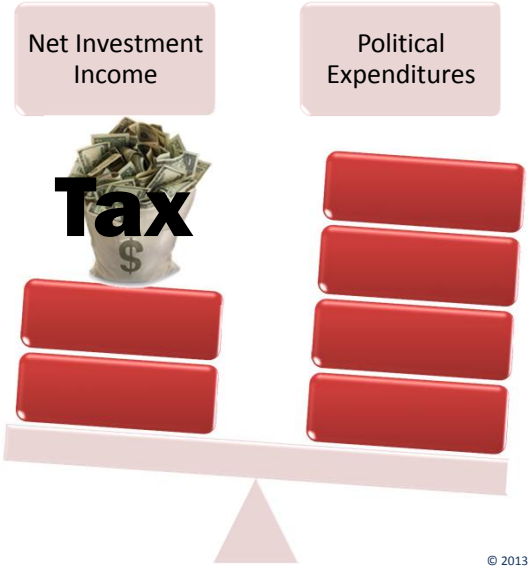
527(f) Tax



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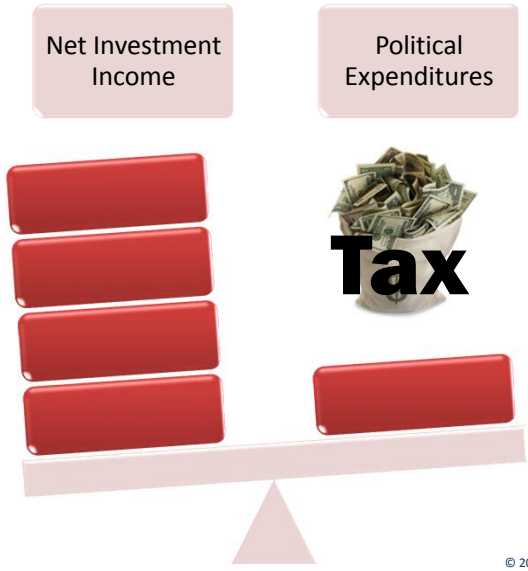
527(f) Tax



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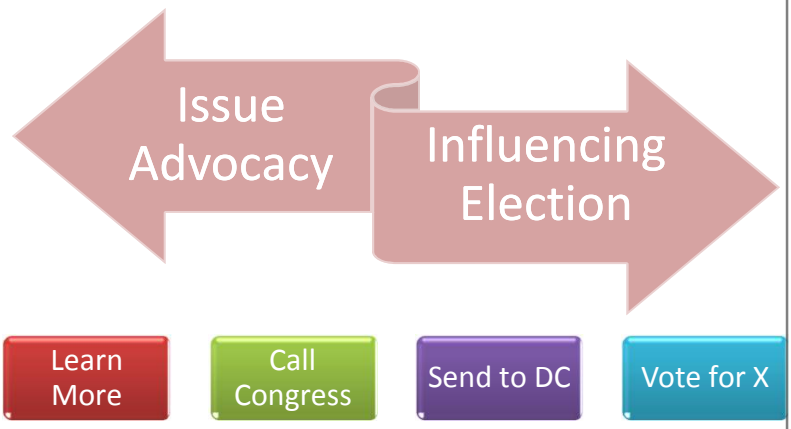
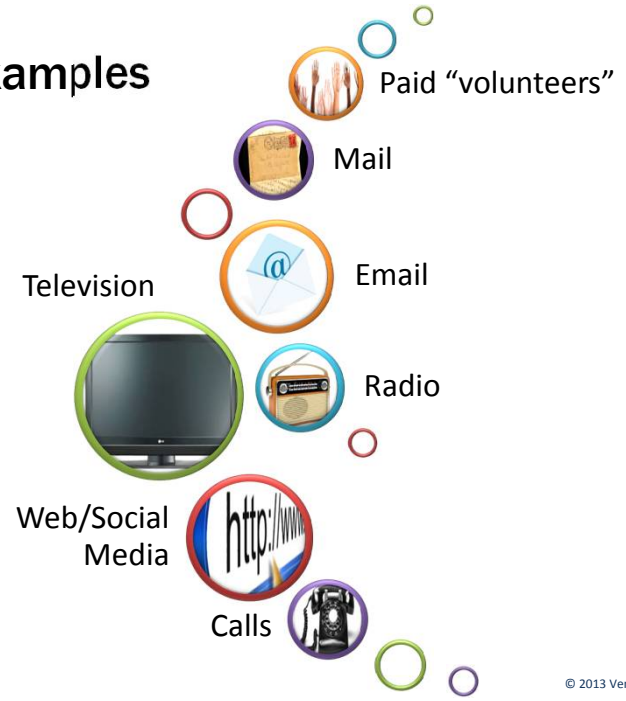
Range of Activities



Learn More | Call Congress | Send to DC | Vote for X

Examples



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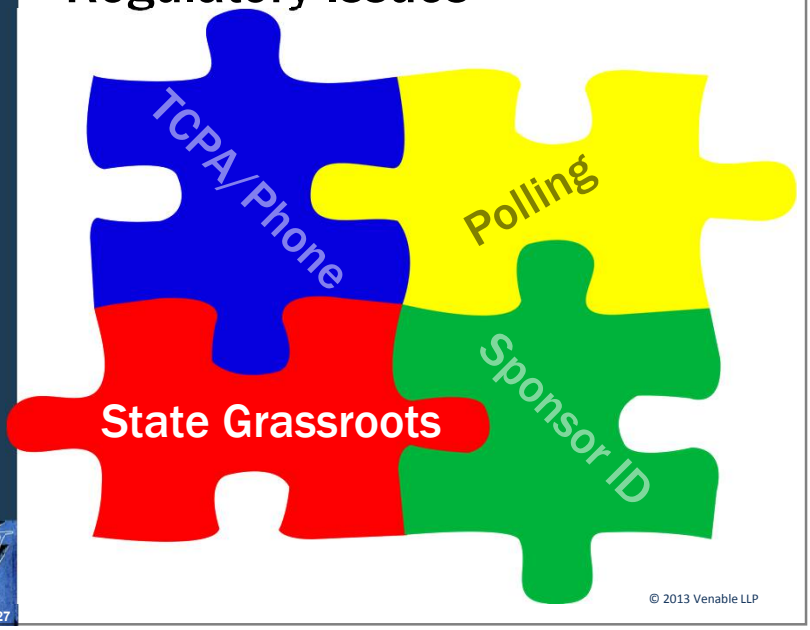
Regulatory Issues



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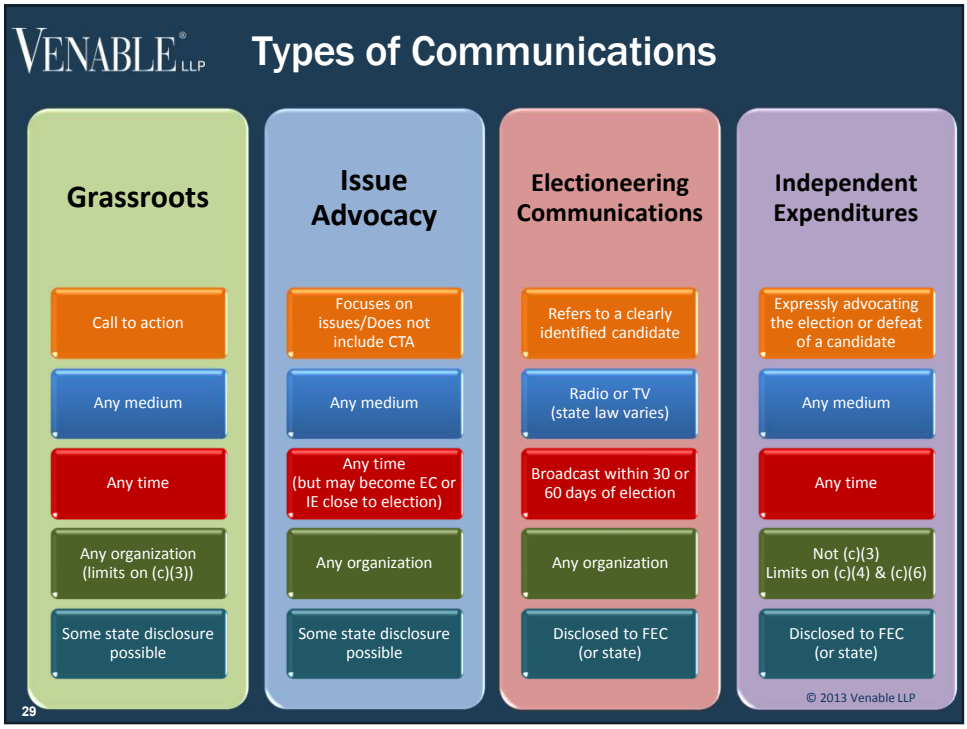
Grassroots Regulations

- Some states require registration
  - Some tied to traditional lobbying
  - Others independent obligation
- Donor disclosure
- May not require call to action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Types of Communications
Grassroots
Call to action
Any medium
Any time
Any organization (limits on (c)(3))
Some state disclosure possible
Issue Advocacy
Focuses on issues/Does not include CTA
Any medium
Any time (but may become EC or IE close to election)
Any organization
Some state disclosure possible
Electioneering Communications
Refers to a clearly identified candidate
Radio or TV (state law varies)
Broadcast within 30 or 60 days of election
Any organization
Disclosed to FEC (or state)
Independent Expenditures
Expressly advocating the election or defeat of a candidate
Any medium
Any time
Not (c)(3) Limits on (c)(4) & (c)(6)
Disclosed to FEC (or state)
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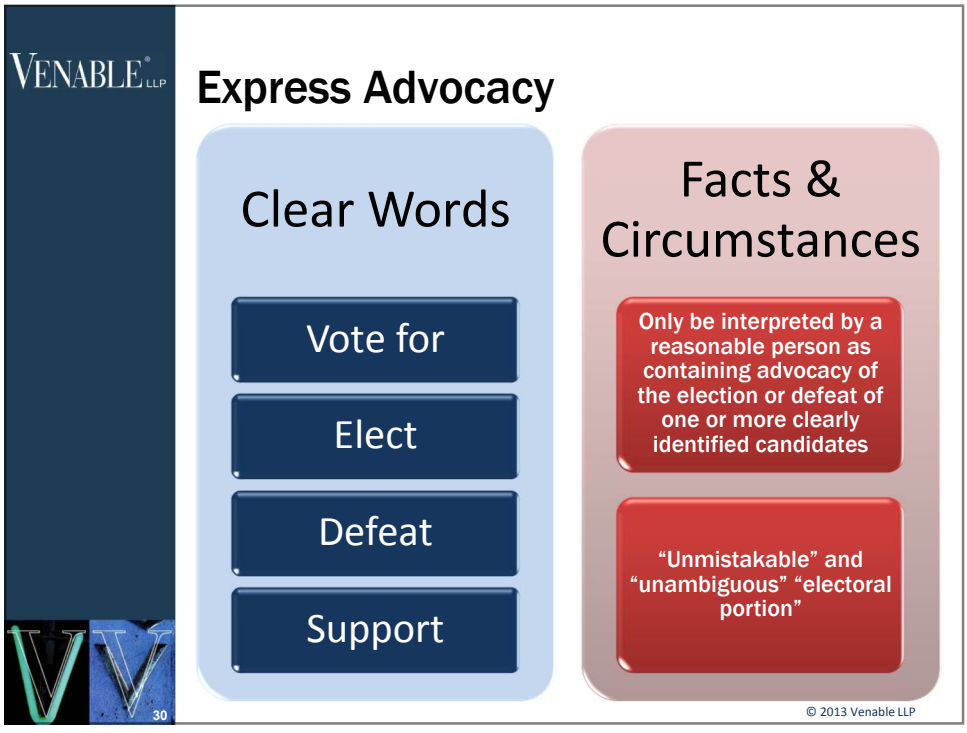
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Express Advocacy
Clear Words
Vote for
Elect
Defeat
Support
Facts & Circumstances
Only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates
"Unmistakable" and "unambiguous" "electoral portion"
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Independent Expenditure

- Expressly Advocates
- Any Medium
- Any Time
- Not Coordinated

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Coordination

In General

Request or Suggestion	Material Involvement	Substantial Discussion	Use of Campaign Material

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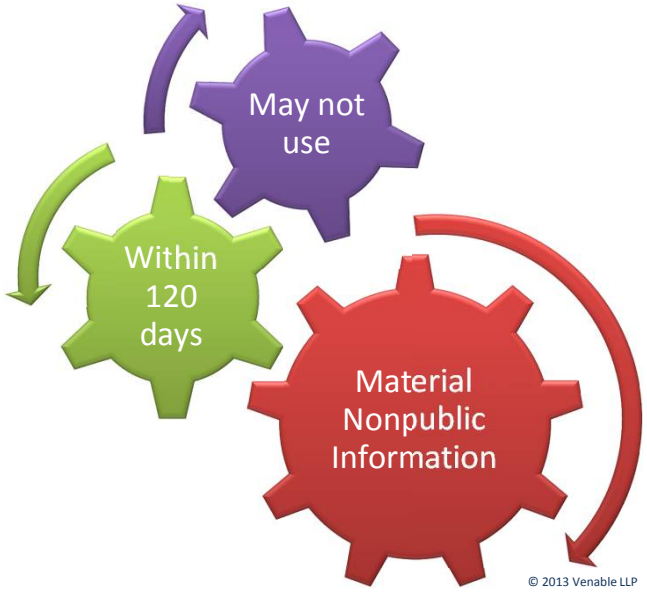
Vendor/Employee



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Trouble Areas for Nonprofits

- Lobbying
- Contributions
- Member Communications
- Vendors

Who can make IEs?

- NOT 501(c)(3)
- 501(c)(6)
- 501(c)(4)
- Political Action Committees
- Super PACs

What is a Super PAC?

- Makes independent expenditures
- Does not contribute to candidates
- May not coordinate with candidates
- Registered with FEC or state
- Unlimited contributions

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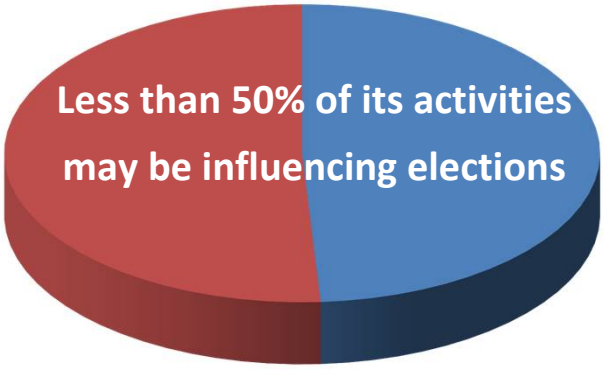
What about 501(c)(4) and (c)(6)s



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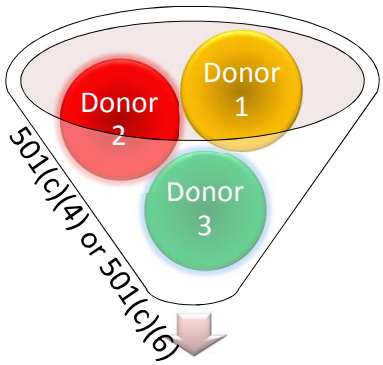
How to Be Active

- Make IEs directly
- Fund a Super PAC

Disclosure by Non-PACs

- Disclose IE expenses
- Disclose contributors who made a donation in excess of $200 to further the independent expenditure

Funding a Federal Super PAC



Entity Disclosed as Contributor by Super PAC

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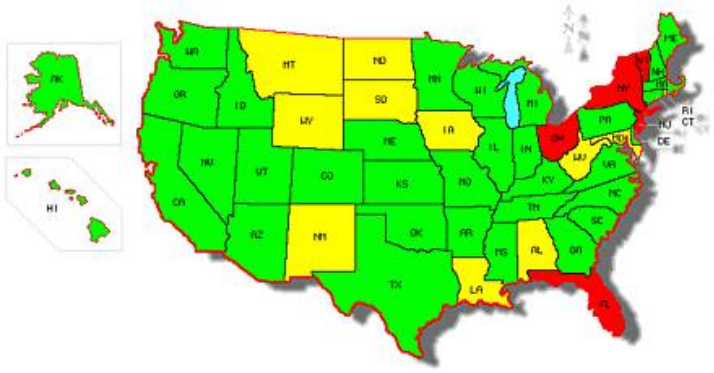
Super PACs in the States



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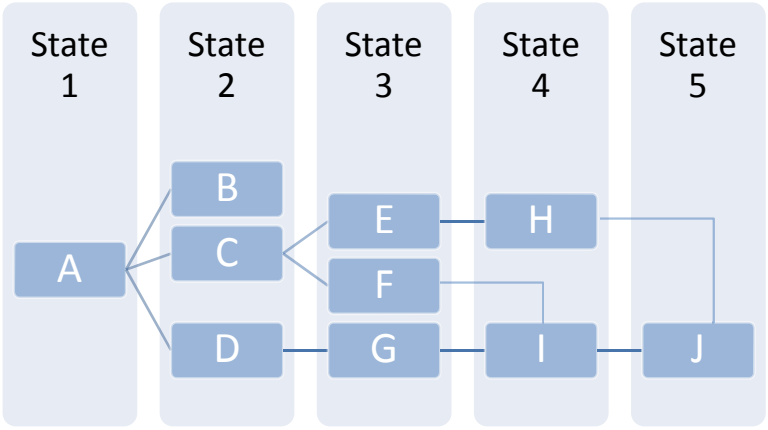
State Disclosure Issues

- States are imposing additional disclosure obligations
- Investigations/Litigation
  - California
  - Montana

Utah Requires Disclosure of Donors

> Donor means a person that gives money, including a fee, due, or assessment for membership in the corporation, to a corporation without receiving full and adequate consideration for the money

A Thought



J discloses H and I
I discloses G and F
H discloses E

Tax Issues

- Primary Purpose
- 501(c)(4) Inquiries
- Congressional Inquiries
- Lack of clear guidance

Satisfying the Primary Purpose

- ✓ Don't rush to create a new entity
- ✓ Plan carefully
- ✓ Consider special purpose entities

Solicitation Disclaimers

Required on fundraising appeals that clearly indicate funds will be targeted to the election or defeat of a candidate

Your Donors/Members

- Shareholder efforts
- Corporate policies
- SEC possible rule

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501(c)(3)s

Campaign

Intervention

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Candidate Appearances

- Invite all candidates
- Equal opportunity to speak at similar events
- Explicitly state no support or opposition
- Tell people everyone was invited
- No fundraising

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Candidate Forums

- Invite everyone (or have objective criteria to limit)
- Equal opportunities to speak at similar events if not all together
- Note FEC rules on simultaneous participation

Candidate Appearances

- Questions prepared and presented by independent nonpartisan panel
- Topics cover broad range of issues
- Provide equal opportunity to respond/present views
- Don't use agree/disagree questions

Candidate Appearances

- Don't comment on questions
- Don't imply approval or disapproval
- No fundraising
- Maintain neutral atmosphere

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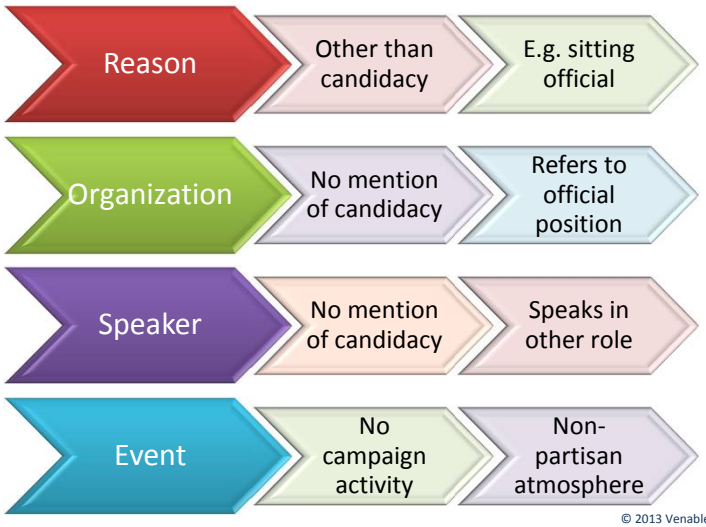
Official Appearances



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Legislative Scorecards

- List all votes by a legislative body
- May include reference to issues
- May not include candidates
- Is it a regular activity
- Is it timed with an election

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Voter Guides/Questionnaires

Structure	All Candidates for office sent questionnaire
	Unbiased structure
	No endorsement
Questions	Clear and unbiased
	Subjects cover major areas of interest
	Clear issue descriptions
	Don't ask to accept a pledge
Answers	Reasonable time to respond
	If limited answers allowed (support/oppose), opportunity to explain position
Guides	Questions the same in the guide as provided to candidates
	Answers the same as provided or edited for space only
	Answers presented close to the question

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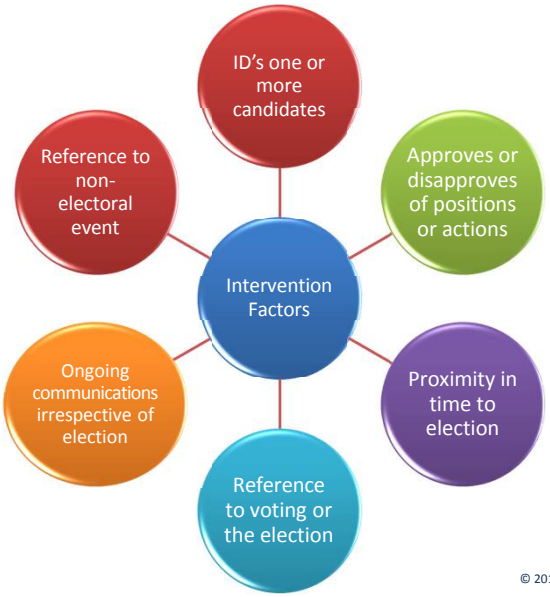
Issue Advocacy



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Staff/Leadership

- Do not use organization resources
- "Identification only" use of name
- Disclaimer – "personal views"

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Staff/Leadership

- Caution when working with 527s
- Caution with personal fundraising

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Lobbying

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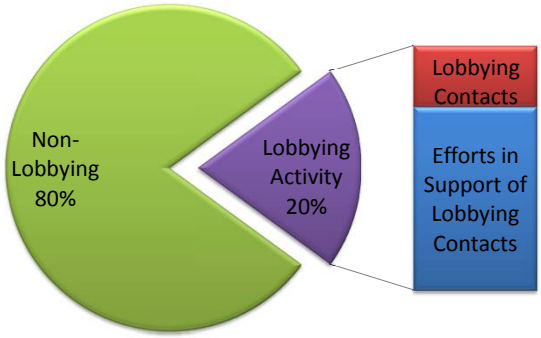
Who is a federal lobbyist?

More than one lobbying contact

PLUS



What is a lobbying contact?

Oral or written communication:

- Legislation
- Policy
- Contracts/Grants
- Nominations

Who is a covered official?

- Congress & Staff
- President & VP
- Executive Office of the President
- Executive Schedule 1-5
- Admirals and Generals
- Schedule C Appointees

What is lobbying activity?

Quarterly Reports

- Issues and agencies lobbied
- Amount spent on lobbying
- Names of lobbyists
- Publicly available

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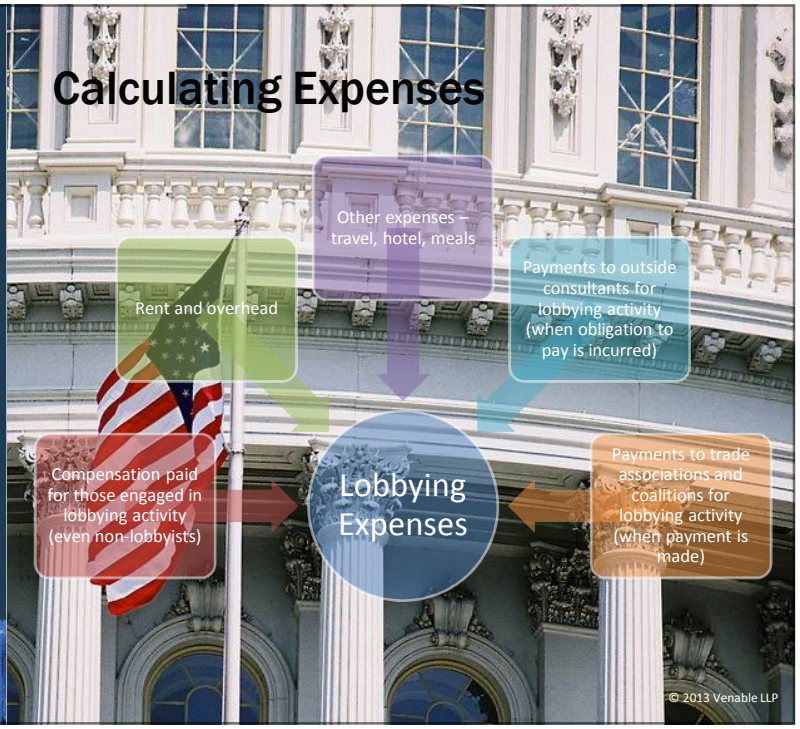
Calculating Expenses



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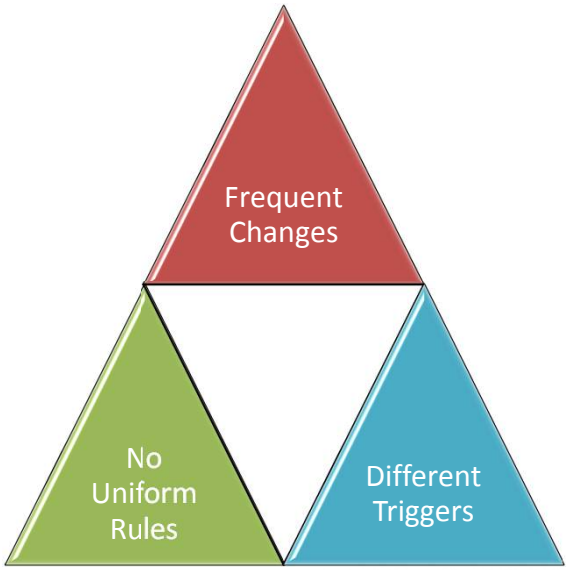
State Lobbying



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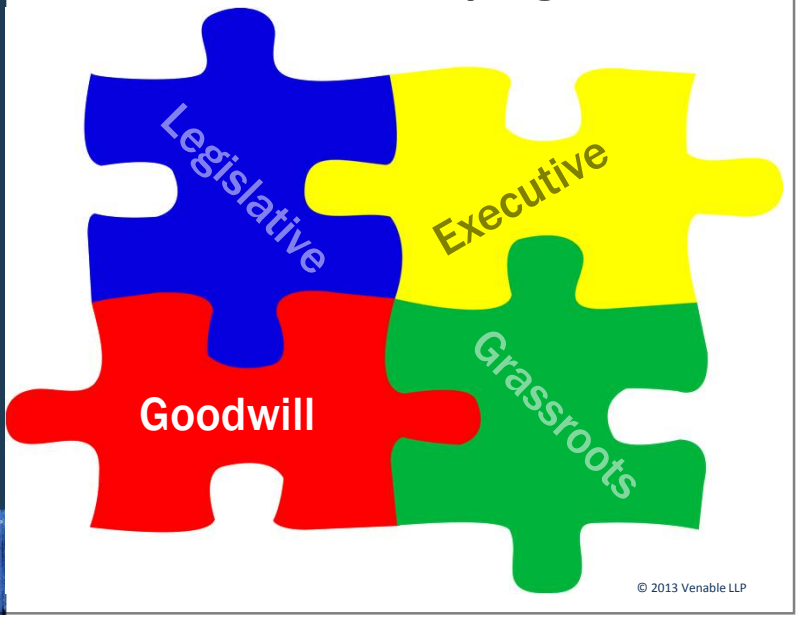
What is state lobbying?



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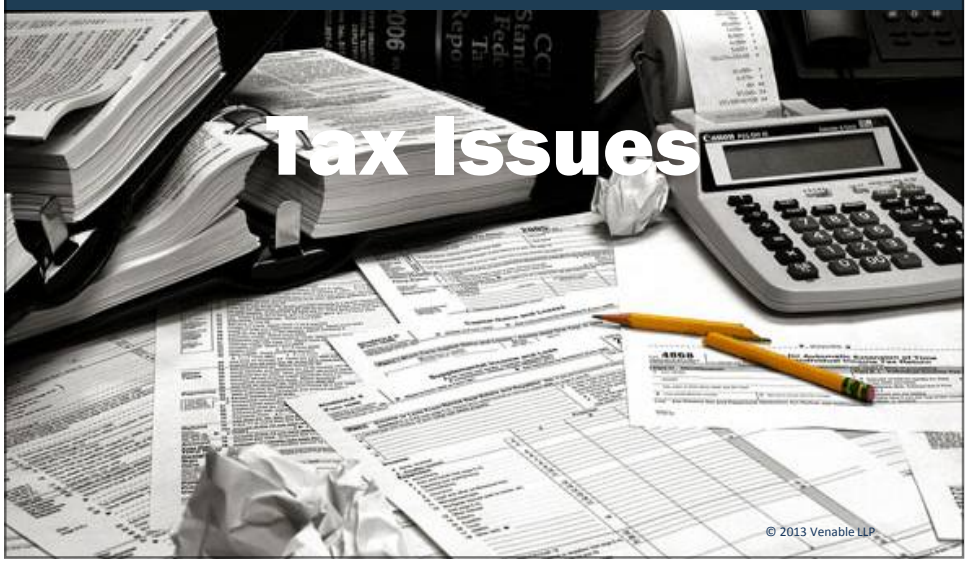

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162(e): Nondeductible Expenses

Notice to Members

Pay Proxy Tax

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Different Definitions

Type of Lobbying	LDA	162(e)
State	No	Yes
Grassroots	No	Yes
Legislative	Yes	Yes
Executive	Broad	Narrow
International	No	Yes

LDA Options

Report using 162(e)

- One set of books
- Numbers may be "off"

Report using LDA

- Two sets of books
- More "accurate" numbers

501(c)(3) Limits on Lobbying

No Substantial Part

Facts and Circumstances	501(h) Election

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Facts and Circumstances

- Balance organization's activities in relation to its objectives and circumstances
- Attempting to influence legislation by propaganda or otherwise
- Proposing, supporting, or opposing legislation

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501(h) Expenditure Test

Influencing Legislation

Grass roots lobbying	Direct lobbying
• Any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof; and	• Any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

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Expenditure Limits

If the amount of exempt purpose expenditures is:	Lobbying nontaxable amount is:
≤ $500,000	20% of the exempt purpose expenditures
>$500,00 but ≤ $1,000,000	$100,000 plus 15% of excess of exempt purpose expenditures over $500,000
> $1,000,000 but ≤ $1,500,000	$175,000 plus 10% of excess of exempt purpose expenditures over $1,000,000
>$1,500,000	$225,000 plus 5% of exempt purpose expenditures over $1,500,000

Grassroots Limit: 25% of total lobbying limit

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LDA Options

Report using 6033(b)(8)

- One set of books
- Numbers may be "off"

Report using LDA

- Two sets of books
- More "accurate" numbers

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Private Foundations

- May not lobby
- May not earmark grants for lobbying
- May provide technical assistance (with written request)
- May conduct nonpartisan analysis

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Common Gift Issues

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Federal Gift Rules

Congress

- Registrant:
  - No, unless exception
- Lobbyist:
  - No, unless exception
- Others:
  - <$50 or exception

Career

- Registrant:
  - $20 or exception
- Lobbyist:
  - $20 or exception
- Others:
  - $20 or exception

Appointee

- Registrant:
  - No, unless exception
- Lobbyist:
  - No, unless exception
- Others:
  - $20 or exception

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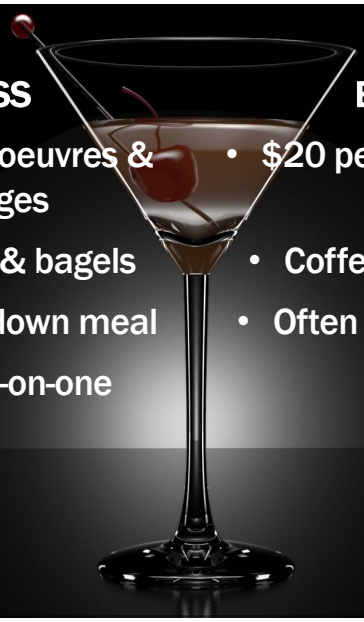
Conference or Similar Event in DC

Invitee	Event	Number of People	Audience
Congress	Speaker at the event Determine that attendance is related to official duties	More than 25 non-Hill	Individuals from an industry or profession or represent a wide range of persons interested in a given matter
Appointee	Speaker	No Specific Number	Diversity of views or interests will be present
Career	In the interest of the agency; further agency programs and operations or speak at the event	No Specific Number	Diversity of views or interests will be present

Conference or Similar Event Outside DC

Invitee	Type of Event	Purpose	Timing	Lobbyist	Process
Congressional 	Meeting, conference, speech, award, fact-finding	Officially connected	1 night if LDA registrant (2 for long trips)	Minimal involvement	Submit approval before trip
		No appearance of private gain			File disclosure form after
 Executive Branch 	Meeting, conference, speech, panel, training, award	In the interest of the government	No limits	No restrictions	Submit approval to agency ethics officer
		No question of government integrity			

Receptions



CONGRESS

- Hors d'oeuvres & beverages
- Coffee & bagels
- No sit-down meal
- No one-on-one

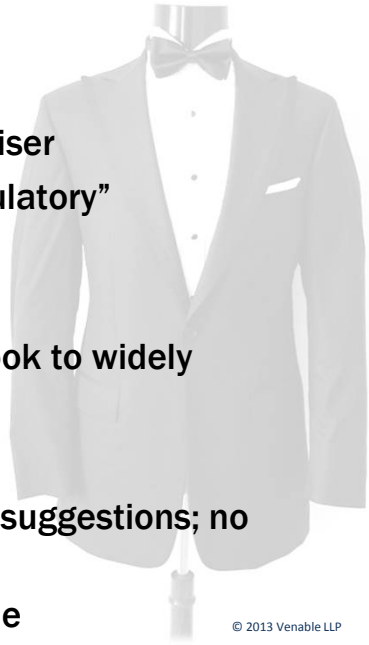
EXEC BRANCH

- $20 per person/$50 per year
- Coffee, donuts, etc.
- Often have to pay to attend

Educational Briefings

- May not be a lobbying or advocacy group
- Universities, think tanks, foundations, etc.
  - May not be used for legislative briefings
- Otherwise might fit widely attended (25 non-Hill people)

Charity Events



- House & Senate
  - Charitable fundraiser
  - Not just "congratulatory" celebration
- Executive
  - No special rule, look to widely attended
- Invitations
  - House: allows for suggestions; no direct contact
  - Senate: harder line

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Putting It All Together

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Risk Management

- Use simple and clear policies and procedures
- Track time on activities that support lobbying
- Keep records that substantiate your due diligence
- Obtain pre-approval of gifts
- Don't forget consultants

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Final Thoughts

- Heavily regulated area, with many traps for the unwary
- Ask first!
- Usually a way to accomplish your goals
- Regardless of the rules, always consider the *Washington Post* test

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Questions?

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For additional information

On Nonprofits:

To view Venable's index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings, www.Venable.com/nonprofits/events.

On Political Law:

For more information on Venable's Political Law Practice, see www.Venable.com/political-law-practices or for frequent updates on political law topics, visit www.PoliticalLawBriefing.com or click here to subscribe to the blog.

Speaker Biographies

VENABLE® LLP

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Jeffrey S. Tenenbaum

Partner

Washington, DC Office

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the 2012 *Legal 500* rankings, and was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, and was named as one of Washington, DC's "Legal Elite" in 2011 by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

AREAS OF PRACTICE

Tax and Wealth Planning
Antitrust
Political Law
Business Transactions Tax
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Wealth Planning
Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
Credit Counseling and Debt Services
Financial Services
Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

REPRESENTATIVE CLIENTS

AARP
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Association for Marriage and Family Therapy
American Bureau of Shipping
American College of Radiology
American Institute of Architects
Air Conditioning Contractors of America
American Society for Microbiology
American Society for Training and Development
American Society of Anesthesiologists
American Society of Association Executives
American Society of Civil Engineers
American Society of Clinical Oncology
American Staffing Association
Associated General Contractors of America
Association for Healthcare Philanthropy

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Association of Corporate Counsel
Association of Private Sector Colleges and Universities
Automotive Aftermarket Industry Association
Brookings Institution
Carbon War Room
The College Board
Council on Foundations
CropLife America
Cruise Lines International Association
Foundation for the Malcolm Baldrige National Quality Award
Goodwill Industries International
Homeownership Preservation Foundation
The Humane Society of the United States
Independent Insurance Agents and Brokers of America
Institute of International Education
Jazz at Lincoln Center
The Joint Commission
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
Money Management International
National Association of Chain Drug Stores
National Athletic Trainers' Association
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
National Telecommunications Cooperative Association
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements
United Nations High Commissioner for Refugees Volunteers of America

HONORS

Recognized as "Leading Lawyer" in the 2012 edition of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.)

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of

Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal issues on Voice of America Business Radio and Nonprofit Spark Radio.

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Lawrence H. Norton

Partner

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Larry Norton, one of the nation's leading authorities on campaign finance, lobbying and government ethics laws, serves as co-chair of Venable's Political Law group. Along with Ronald Jacobs, Mr. Norton co-edits the firm's Political Law Briefing blog. He has extensive experience advising public and private companies, nonprofits, and trade associations on such matters as –

- Compliance audits of PACs and other political activity, lobbying registration and disclosure, and policies and procedures regarding gifts to public officials
- Design and implementation of compliance programs, and training
- Risk management regarding "pay-to-play" laws, which restrict political contributions by companies doing business with the government, and by their principals
- Establishing and operating federal and state PACs, Super-PACs, 527 groups, and other advocacy organizations, and their use of traditional and social media
- Conducting internal investigations
- Responding to government audits and law enforcement investigations

From 2001-2007, Mr. Norton served as General Counsel for the Federal Election Commission. Through this position, he played a prominent role in the implementation of the Bipartisan Campaign Finance Reform Act of 2002, commonly referred to as the McCain-Feingold law. Prior to his tenure at the FEC, he served as Associate Director in the Division of Enforcement at the Commodity Futures Trading Commission and at the Federal Trade Commission as Assistant Director in the Bureau of Consumer Protection. Before joining the federal government, Mr. Norton served as a Maryland Assistant Attorney General in the Civil Litigation Division. He began his legal career at Venable as a litigation associate.

AREAS OF PRACTICE

Political Law

Legislative and Government Affairs

Regulatory

INDUSTRIES

Nonprofit Organizations and Associations

GOVERNMENT EXPERIENCE

Assistant Director, Bureau of Consumer Protection, Federal Trade Commission

Assistant Attorney General, Civil Litigation Division, Office of the Maryland Attorney General

Associate Director, Division of Enforcement, Commodity Futures Trading Commission

General Counsel, Federal Election Commission

BAR ADMISSIONS

District of Columbia

Maryland

New York

EDUCATION

HONORS

Recognized in the 2012 edition of *Chambers USA,* Political Law, National

Listed among the 2011-2012 Top Lawyers: Campaigns and Elections by *Washingtonian* magazine

PUBLICATIONS

Mr. Norton is co-editor of the firm's Political Law Briefing blog.

- February 2013, 2013-2014 Federal Contribution Limits
- December 2012, New York Attorney General Proposes New Rules Requiring Nonprofits Funding Political Communications to Disclose Donors
- November 26, 2012, Government Contractors Face Growing Risks from Laws Regulating Political Contributions, Political Law Alert

J.D., University of Maryland School of Law, 1983

Order of the Coif

Assistant Editor, *Maryland Law Review*

B.A., *magna cum laude*, University of Maryland, 1980

MEMBERSHIPS

Maryland Office of Attorney General Campaign Finance Advisory Task Force, 2010

- November 2012, Federal Ban on Government Contractor Political Contributions Upheld, Political Law Alert
- September 2012, Electioneering Communications
- August 14, 2012, Election-Year Activities for 501(c)(3)s: Being Involved without Intervening
- August 2012, Hosting a Federal Campaign Fundraiser on Association Property, Political Law Alert
- August 2012, FCC Orders TV Stations to Post Their Political Files Online, Political Law Alert
- May 23, 2012, Developing a Political Compliance Plan, *Inside Counsel*
- May 2012, FCC Orders TV Stations to Post Their Political Files Online
- May 2012, Groups Sponsoring Electioneering Communications Must Disclose All Donors Pending Appeal of District Court Order
- May 2012, Representing Foreign Entities
- March 2012, Forming a Corporate Political Action Committee
- January 2012, Forming an Association Political Action Committee
- October 28, 2011, Communicating with Members after *Citizens United*
- September 15, 2011, Lobbying: What Does It Mean for Nonprofits?

SPEAKING ENGAGEMENTS

- April 16, 2013, Public Policy and Politics: Compliance Tips for Your Nonprofit's Advocacy and Electoral Efforts
- February 27, 2013, Political Law 101
- February 8, 2013, "Campaign Finance and the 2012 Election" at The Center for Constitutional Government
- December 4, 2012, "Citizens United? Evaluating the 2012 Presidential Election in a 'Super PAC' World" for the American Bar Association
- August 14, 2012, Legal Quick Hit: "Your 501(c)(3) in an Election Year: What Can You Do to Be Part of the Process?" for the Association of Corporate Counsel's Nonprofit Organizations Committee

VENABLE LLP

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Ronald M. Jacobs

Partner — *Washington, DC Office*

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Ronald Jacobs serves as co-chair of Venable's Political Law Group and advises clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities. He also assists clients with crises response to government investigations and enforcement actions, Congressional investigations, class-action law suits, and other high-profile problems that involve potentially damaging legal and public-relations matters. Along with Lawrence Norton, Mr. Jacobs co-edits the firm's Political Law Briefing blog.

Mr. Jacobs understands the often-contradictory rules imposed by the different laws that apply to political activities. He offers practical advice that considers not only the legal requirements, but also the reputational risk, of political activity to a broad range of clients, including large and small companies, trade associations, ideological groups, individuals, and political vendors. He has developed political compliance programs for Fortune 500 companies and other clients that lobby and make political contributions nationwide.

In addition to counseling clients on political law matters, Mr. Jacobs has extensive experience in the administrative rulemaking process and in litigating challenges to agency decisions in federal court. He has represented clients in administrative matters before the Federal Election Commission, the Merit Systems Protection Board, the Federal Trade Commission, the United States Congress, and in federal court.

Mr. Jacobs has also counseled and defended clients in a host of other regulatory matters, including disputes involving the Foreign Corrupt Practices Act, the Foreign Agents Registration Act, and privacy and data security issues.

SIGNIFICANT MATTERS

Some of Mr. Jacobs's significant matters have included:

- Successfully defending a large, nationally-known trade association during a Congressional investigation into allegations of fraudulent grassroots lobbying activity.
- Representing a campaign finance reporting company through an FBI investigation of a former business partner accused of campaign fraud, ultimately convincing the government to return assets that had been wrongly seized from the company.
- Assisting a large social welfare organization with multiple Congressional investigations and several class action lawsuits.
- Successfully petitioning the FEC to reverse a long-standing rule to allow trade associations to use payroll deduction for their PAC activities.
- Assisting a company in fending off government investigations and rebuilding its reputation following problems with a school program to attend the 2009 presidential inauguration.

AREAS OF PRACTICE

Legislative and Government Affairs

Political Law

Tax-Exempt Organizations

Foreign Corrupt Practices Act and Anti-Corruption

Congressional Investigations

Appellate Litigation

Regulatory

Advertising and Marketing Litigation

INDUSTRIES

Nonprofit Organizations and Associations

Consumer Products and Services

Life Sciences

Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Field Representative, United States House of Representatives, Office of Representative Steve Chabot (R-OH)

BAR ADMISSIONS

District of Columbia

Virginia

COURT ADMISSIONS

U.S. Supreme Court

U.S. Court of Appeals for the D.C. Circuit

U.S. Court of Appeals for the Federal Circuit

U.S. District Court for the District of Columbia

U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Eastern District of Virginia

U.S. Court of International Trade

EDUCATION

J.D., *high honors*, George Washington University Law School, 2001

Order of the Coif

Articles Editor, *The George Washington Law Review*

Imogene Williford Constitutional Law Award

B.A., *cum laude*, The George Washington University, 1997

Omicron Delta Kappa

MEMBERSHIPS

American Bar Association

Federalist Society, Free Speech and Election Law practice group

- In a pro bono matter, convincing the DC Court of Appeals to establish new procedural protections for child custody cases similar to those used in many other states.
- Successfully litigating a Hatch Act case before the Merit Systems Protection Board involving a school district's ability to re-hire a teacher previously dismissed for campaigning for public office.
- Reversing a decision by Immigration and Customs Enforcement to revoke a language school's accreditation.

HONORS

Recognized in the 2012 edition of *Chambers USA*, Government: Political Law, National

Recognized in the 2011 edition of *Chambers USA*, Government: Political Law, National

ACTIVITIES

Mr. Jacobs is a frequent speaker and author on campaign finance and lobbying regulation issues. He serves on the board of the Human Rights Foundation, a nonprofit organization dedicated to preserving democracy and protecting human rights in the Americas.

PUBLICATIONS

Mr. Jacobs has authored or co-authored a number or articles on campaign finance issues, the Telephone Consumer Protection Act, the Telemarketing Sales Rule (both of which govern the national do-not-call list), using the fax for marketing purposes, unsolicited email. Mr. Jacobs is also co-editor of the firm's Political Law Briefing blog.

- February 2013, 2013-2014 Federal Contribution Limits
- December 2012, New York Attorney General Proposes New Rules Requiring Nonprofits Funding Political Communications to Disclose Donors
- November 26, 2012, Government Contractors Face Growing Risks from Laws Regulating Political Contributions, Political Law Alert
- November 2012, Federal Ban on Government Contractor Political Contributions Upheld, Political Law Alert
- October 12, 2012, Nonprofit Bloopers: Avoiding Political and Promotional Pitfalls
- September 25, 2012, Election-Year Issues for 501(c)(3) Organizations: How You Can and Cannot Get Involved in the Political Process
- September 2012, Electioneering Communications
- August 2012, Hosting a Federal Campaign Fundraiser on Association Property, Political Law Alert
- August 14, 2012, Election-Year Activities for 501(c)(3)s: Being Involved without Intervening
- August 2012, FCC Orders TV Stations to Post Their Political Files Online, Political Law Alert
- May 23, 2012, Developing a Political Compliance Plan, *Inside Counsel*
- May 2012, FCC Orders TV Stations to Post Their Political Files Online
- May 2012, Groups Sponsoring Electioneering Communications Must Disclose All Donors Pending Appeal of District Court Order
- May 2012, Representing Foreign Entities
- May 9, 2012, Lobbying, Registration and Reporting Requirements, *Inside Counsel*
- May 8, 2012, Election Year Issues for 501(c)(3) Organizations
- April 25, 2012, Limiting Corporate Political Activity, *Inside Counsel*
- April 12, 2012, Lobbying and Political Activities: Rules of the Road for Nonprofits
- April 11, 2012, How to Play by the Pay-to-Play Rules: 10 Things to Consider if Your Company Does Business With the Government, *Inside Counsel*
- March 28, 2012, It's a Bird, It's a Plane, No, It's a Super PAC!, *Inside Counsel*

- March 14, 2012, Four Ways Corporations Can Participate in Federal Elections, *Inside Counsel*
- March 2012, Forming a Corporate Political Action Committee
- February 22, 2012, Political Activity and the Board Room: Limiting Corporate Political Expenditures Through Disclosure, Corporate Law, and Shareholder Proposals, *Bloomberg Law Reports*
- January 2012, Forming an Association Political Action Committee

SPEAKING ENGAGEMENTS

Mr. Jacobs has participated in a number of panel discussions and seminars on the impact of various communication and privacy regulations on trade and professional associations and other businesses. He has addressed GWSAE, ASAE, The Direct Marketing Association, and the Mortgage Bankers Association.

- April 16, 2013, Public Policy and Politics: Compliance Tips for Your Nonprofit's Advocacy and Electoral Efforts
- March 5, 2013, "Contribution Limits and the Supreme Court" for the American League of Lobbyists
- February 28, 2013, Radio Interview on *The Inner Loop*
- February 27, 2013, Political Law 101
- October 12, 2012, "Nonprofit Bloopers: Avoiding Political and Promotional Pitfalls" for Association of Fundraising Professionals DC Chapter's Advanced Education Session
- September 20, 2012, ACG Webinar Series: "Pay to Play"
- August 14, 2012, Legal Quick Hit: "Your 501(c)(3) in an Election Year: What Can You Do to Be Part of the Process?" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- June 1, 2012 - June 2, 2012, Political Law and 2012 Election panel at George Washington University Law School
- May 8, 2012, Legal Quick Hit: "Election Year Issues for 501(c)(3) Organizations" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 12, 2012, Lobbying & Political Activities: Rules of the Road for Nonprofits
- April 11, 2012, "Best Practices for Investment Advisers to Avoid Violating Pay to Play Regulations," IAA Legal & Regulatory Webinar
- March 14, 2012, SuperPAC Panel and Political Law Networking Reception at George Washington University

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Janice M. Ryan

Associate

Washington, DC Office

T 202.344.4093 F 202.344.8300

jmryan@Venable.com

Janice Ryan is an associate in the firm's Regulatory Affairs Practice Group, where she focuses her practice on counseling trade and professional associations, public charities, private foundations, and other nonprofits on a wide variety of legal topics, including tax exemption, corporate governance, antitrust, transactional, and political activities matters. Ms. Ryan also advises for-profit and nonprofit clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities. Ms. Ryan develops comprehensive political compliance programs tailored to clients' needs, and assists clients to implement those programs on an ongoing basis.

Previously, Ms. Ryan served as a Legislative Assistant to U.S. Senator Patrick Leahy (D-VT), where she handled health care, education, human services, and food and nutrition policy matters.

AREAS OF PRACTICE

Political Law

Tax-Exempt Organizations

Legislative and Government Affairs

INDUSTRIES

Nonprofit Organizations and Associations

GOVERNMENT EXPERIENCE

Legislative Assistant, United States Senate, Office of Senator Patrick Leahy (D-VT)

BAR ADMISSIONS

District of Columbia

Maryland

COURT ADMISSIONS

U.S. Tax Court

EDUCATION

J.D., *summa cum laude*, Catholic University of America, Columbus School of Law, 2008

Associate Editor, *The Catholic University Law Review*

Recipient, The John L. Garvey

PUBLICATIONS

- March 25, 2013, Revisiting 'Force Majeure' for Association Meetings and Events
- February 2013, 2013-2014 Federal Contribution Limits
- November 26, 2012, Government Contractors Face Growing Risks from Laws Regulating Political Contributions, Political Law Alert
- September 25, 2012, Election-Year Issues for 501(c)(3) Organizations: How You Can and Cannot Get Involved in the Political Process
- August 19, 2012, Framework for Nonprofit Legal Stewardship
- July 12, 2012, Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies
- May 2012, Groups Sponsoring Electioneering Communications Must Disclose All Donors Pending Appeal of District Court Order
- May 2012, FCC Orders TV Stations to Post Their Political Files Online
- May 2012, Representing Foreign Entities
- May 9, 2012, The Top Ten Things You Need to Know about the New District of Columbia Nonprofit Corporation Act
- May 8, 2012, Election Year Issues for 501(c)(3) Organizations
- March 14, 2012, Four Ways Corporations Can Participate in Federal Elections, *Inside Counsel*
- March 2012, Forming a Corporate Political Action Committee
- January 2012, Forming an Association Political Action Committee
- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply

Faculty Award

A.B., Dartmouth College, 2000

MEMBERSHIPS

American Bar Association

Maryland State Bar Association

- December 13, 2011, The Nuts and Bolts of Lobbying for 501(c)(3) and 501(c)(6) Exempt Organizations
- November 18, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- February 2011, Understanding Force Majeure Clauses
- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert

SPEAKING ENGAGEMENTS

- May 14, 2013, Legal Quick Hit: "Revising 'Force Majeure' for Nonprofit Meetings and Events" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 16, 2013, Public Policy and Politics: Compliance Tips for Your Nonprofit's Advocacy and Electoral Efforts
- April 8, 2013, "Online Advocacy: Leveraging New Media Methods in Your Advocacy Efforts" for the American League of Lobbyists and Lobbyists.info
- August 19, 2012, "Framework for Nonprofit Legal Stewardship" at the Nursing Organizations Alliance's 8th Annual Nursing Alliance Leadership Academy
- July 12, 2012, Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies
- May 8, 2012, Legal Quick Hit: "Election Year Issues for 501(c)(3) Organizations" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 3, 2012, "Hot Topics - The District of Columbia Nonprofit Corporation Act of 2010" at AFG's 10th Annual National Conference on Association Foundations & Fundraising
- April 16, 2012, "Online Advocacy: Rules for the Road," American League of Lobbyists
- February 16, 2012, "Everything You Need to Know to Comply With The New D.C. Nonprofit Corporation Act" at West, Lane & Schlager Realty Advisors Applied Knowledge Lunch Series
- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- December 13, 2011, "The Nuts and Bolts of Lobbying for 501(c)(3) and 501(c)(6) Exempt Organizations" for CooperationWorks!

Additional Information

VENABLE® LLP

Articles

September 25, 2012

Election-Year Issues for 501(c)(3) Organizations: How You Can and Cannot Get Involved in the Political Process

AUTHORS

Ronald M. Jacobs

Janice M. Ryan

RELATED PRACTICES

Political Law

RELATED INDUSTRIES

Nonprofit Organizations and Associations

ARCHIVES

2013 2009 2005
2012 2008 2004
2011 2007 2003
2010 2006

The presidential election is less than 45 days away. Federal tax law strictly prohibits 501(c)(3) organizations from engaging in activities to support or oppose candidates for public office. However, there are still a number of ways that 501(c)(3)s can be involved in the political process without running afoul of the law.

Unfortunately, the line between prohibited and permissible activities is murky and can be easily crossed if proper managers of the 501(c)(3) are not careful in how they plan and execute the activities. Now might be a good time to review the rules that will help stay on the right side of the line while involved in the process.

If done correctly, 501(c)(3) organizations can:

- Help register voters;
- Conduct get-out-the-vote activities;
- Publish voter guides;
- Create candidate questionnaires;
- Host candidate appearances;
- Host debates;
- Conduct issue advocacy;
- Allow leadership and staff to be politically active; and
- Create an affiliated organization to engage in political activities that it cannot.

The key is to remember that these activities must be non-partisan, and not favor one candidate over another.

Prohibited Intervention

The Internal Revenue Code prohibits 501(c)(3) organizations from engaging in political campaign intervention. Political campaign intervention includes any direct or indirect activities in support of or opposition to any candidate for elective public office. The ban applies to elections at any level of government, whether federal, state, or local.

This prohibits 501(c)(3) organizations from endorsing candidates or making other public statements of support or opposition to a candidate for office. Distributing – or even in some cases linking to – statements prepared by others that favor or oppose candidates for elective office also constitutes prohibited campaign intervention.

Furthermore, a 501(c)(3) organization may not allow a candidate to use the organization's facilities, staff, or other resources (whether monetary or in-kind). This means that the organization's offices, computers, photocopiers, telephones, and other supplies and equipment should not be used for prohibited campaign activities, and that staff should not engage in prohibited campaign intervention during work time.

Stiff consequences await organizations that violate the ban. The Internal Revenue Service (IRS) may deny or revoke the organization's exempt status, may impose excise taxes on the organization, and, in some cases, impose those excise taxes on responsible individuals within the organization.

The potential for adverse consequences does not end with the IRS, however. Federal and many state campaign finance laws prohibit corporations from making campaign contributions. Because many, if not most, 501(c)(3) organizations are corporations, they are subject to corporate contribution bans under the campaign finance laws. Contributing use of the organization's facilities, staff, or other resources to support or oppose a candidate could result not only in adverse tax consequences, but also could result in fines or other penalties imposed by the Federal Election Commission (FEC) or applicable state

election authorities.

Much has been made of the U.S. Supreme Court's January 2010 *Citizens United v. Federal Election Commission* decision overturning many restrictions on corporations. Specifically, it allowed corporations to make independent expenditures in support of or in opposition to candidates. Remember, however, that *Citizens United* did not change the tax code: 501(c)(3)s may not fund and provide materials (whether TV, radio, mail, or websites) that support or oppose a candidate. A social welfare organization or a trade association may be able to spend millions on ads attacking a candidate, but a 501(c)(3) still cannot do so.

Permissible Activities

A variety of nonpartisan activities may be conducted by 501(c)(3) organizations during or in connection with an election if properly structured in accordance with IRS guidance. Permissible activities include nonpartisan and unbiased efforts to provide voter education and encourage voter participation in the electoral process. Organizations may also continue to discuss and engage in advocacy on policy issues of interest to the organization. The parameters of these and other permissible activities are discussed below.

Voter Registration and GOTV – 501(c)(3) organizations may conduct nonpartisan get-out-the-vote and voter registration drives. The efforts must be focused solely on the importance of voting and how to register. There can be no evidence of bias for a particular candidate or political party.

Voter Guides and Candidate Questionnaires – 501(c)(3) organizations may prepare and distribute unbiased and nonpartisan materials intended to help voters compare candidates' positions on a broad range of issues, such as legislative scorecards, candidate surveys, and similar voter education materials. However, the IRS views these materials as a high-risk activity. To minimize risk, the materials should follow these guidelines:

- Questions and any other descriptions of issues should be unbiased in structure and content;
- Questions and topics should cover most major issues of interest to the entire electorate;
- Questions and responses should be presented as they were asked and received, without editing by the organization;
- Candidates should be provided the opportunity to respond to questions in their own words, and not limited simply to yes/no or support/oppose responses;
- All candidates seeking election to the same office should be invited to participate in the survey;
- The questions and accompanying materials should not comment on the candidates' positions; and
- Candidates should not be asked to pledge to support a particular position, as this could convey the organization's endorsement of that candidate.

There are two major areas of concern with questionnaires and voter guides. First, if they are focused on a set of issues that are tied to the organization, then it is very easy for the questionnaire to convey the organization's endorsement. For example, a hypothetical group called Save the Starfish may ask a series of questions about how a candidate will preserve shallow coastal waters to protect starfish. The IRS would likely view this as attempting to endorse the candidate who answers the questions "correctly."

Second, if the materials are structured or edited to reflect bias in favor of a particular position of one or more candidates, then the organization also risks violating the ban on political campaign intervention.

That being said, organizations that prepare and distribute legislative scorecards on a single or narrow set of issues of particular interest to the organization on a regular and ongoing basis – i.e., not just during political campaign season – may continue to do so during campaign season, as long as it is done in the same manner as at other times throughout the year. If the organization has not published this kind of voting record regularly throughout the year, however, it may not start during the campaign.

Candidate Appearances and Debates – 501(c)(3) organizations may sponsor nonpartisan and unbiased candidate debates and appearances. To minimize risk of violating the ban on political campaign intervention in connection with such events, the following guidelines should be followed:

- Do not indicate support for or opposition to any candidate, explicitly or through biased presentation of topics or questions;
- Questions and topics should cover most major issues of interest to the entire electorate;
- Do not allow political fundraising to take place at the event; and
- Provide an equal opportunity to all candidates seeking election to the same office to speak or be a part of the debate. The organization may establish reasonable, objective criteria to limit the number of participants (such as a polling threshold or qualification to be on a ballot).

Also, even someone who is a candidate may address a 501(c)(3) if the address is unrelated to his or her candidacy. For example, a sitting official may be asked to speak in an official capacity, or an expert on a particular topic may be asked to present to the organization. However, the candidacy and the election may not be mentioned by the speaker or by the organization.

Issue Advocacy – Organizations may generally continue to engage in public issue advocacy. For example, they may air commercials urging Congress to support legislation. Note that there are limits on the amount of grassroots lobbying in which a 501(c)(3) may engage. Organizations may use social media to discuss an issue, or publish newsletters about issues.

However, the organization must be careful that these efforts do not cross the line into campaign intervention. Any time issue advocacy mentions a candidate, there is a risk that it will be considered to be engaged in campaign intervention. Also remember that the federal campaign finance laws, and many state laws, require disclosures in connection with issue ads that clearly identify a candidate for federal office.

At the federal level these disclosures for "electioneering communications" are required when an organization conducts radio or TV ads that refer to a clearly identified candidate for federal office either 30 days before a primary election or 60 days before the general election. An ad saying "Call Congressman Jones and tell him to vote yes on H.R. 1" can trigger such a report.

Personal Activities by Organization Leaders or Staff – The ban on 501(c)(3) political campaign intervention does not prohibit the officers, directors, members, or employees of the organization from participating in a political campaign. They must, however, say or do everything for the campaign as private citizens and not as spokespersons for or agents of the organization. They absolutely cannot use the organization's resources or assets in any manner.

Establishing a clear policy governing political activities for leaders and staff is a good practice to facilitate compliance with tax and campaign finance law restrictions. The policy should prohibit leaders and staff from making political statements on behalf of the organization in any manner, whether on official letterhead, at official functions, or in official media outlets, including newsletters, or on the organization's website and social media sites. The policy should also prohibit personal political activities during work time, and prohibit use of the organization's facilities or resources for personal political activities at any time.

Activities of Affiliate Entities – Although 501(c)(3) organizations are prohibited from directly engaging in political campaign intervention activities, the U.S. Supreme Court has ruled that 501(c)(3)s can establish affiliated 501(c)(4)s, 501(c)(6)s, or other tax-exempt affiliates to carry on lobbying activities and political campaign activities. They may not set up Section 527 organizations, which include political action committees (PACs). In fact, an affiliated 501(c)(4) or (c)(6) entity could itself establish a connected PAC. The affiliated entity generally must have independent funding sources for which no charitable tax deduction will be available. Also, any political activities must be carried out in accordance with applicable federal or state campaign finance laws.

* * * * *

At the end of the day, 501(c)(3) organizations must be very careful in how they conduct activities that involve political candidates and elections, but they still have many opportunities to be engaged in the political process.

* * * * *

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Articles

October 28, 2011

Communicating with Members after *Citizens United*

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Informing members of new developments and their meaning is central to any association's mission. That message may involve commending or criticizing a federal candidate or officeholder. Although associations have always had broad leeway to communicate with their members, many association communications reach beyond just the membership and include the general public. In the past, this presented a problem because federal law prohibited corporations—including associations (both membership organizations and trade associations)— from spending money for communications to the general public that advocated electing or defeating a federal candidate.

The U.S. Supreme Court's *Citizens United* decision loosened these constraints, offering associations more choices in what they may communicate through newsletters, mailings, the web, paid advertisements, and other communication vehicles that go beyond just their membership. This is important because the people you consider to be members may not be members in the eyes of the Federal Election Commission ("FEC"). Thus, *Citizens United*'s ultimate benefit for associations may simply be that you are now free to use your usual suite of communications vehicles without worrying whether the audience is just your membership as defined under federal campaign finance law.

Overview of FEC Rules

Restrictions and the changes brought by Citizens United

The Federal Election Campaign Act ("FECA") prohibits corporations from spending treasury funds to influence a federal election. This includes giving money to campaigns, providing candidates with free or discounted services and, until January 2010, paying for "independent expenditures"—communicating to the public messages containing express advocacy. "Express advocacy" means certain "vote for/against" phrases or their functional equivalent, which is what a reasonable person would conclude means nothing but a call to elect or defeat a clearly identified federal candidate. Roughly one-half of the states also prohibited direct corporate contributions or independent expenditures.

In January 2010, the U.S. Supreme Court invalidated significant political speech restrictions in *Citizens United vs. Federal Election Commission*. Thus, all types of corporations, whether business or nonprofit, may now urge the public to elect or defeat federal candidates or fund other groups' independent expenditures. Many of the states that prohibit corporate political activity have stricken the corporate independent expenditure ban from their laws in response to *Citizens United* or announced they will not enforce the old prohibitions. The Court upheld disclosure requirements for the costs of making independent expenditures and "electioneering communications" (radio/TV/cable/satellite ads that air just before an election and merely identify a federal candidate without urging any election-related action), as well as for the contributors who funded these activities.

In short, *Citizens United* changed the way associations may legally communicate political messages, freeing them up to advocate for or against candidates. Although many think of expensive television campaigns, the real value to associations may be the ability to use the full toolkit of ways associations communicate with their members, and not worrying about whether those communications go beyond the membership.

Your members may not be your members

It is important to remember that your definition of who is a member of your association may be much broader than the federal campaign finance law's definition. Thus, even internal communications to members may include non-members, so you will need to consider the rules governing communication of political speech to the general public.

FECA's statutory provisions and the FEC's regulations have long permitted corporations to engage in

certain election-related activities, such as endorsing a candidate in a press release to the usual list of reporters the association contacts for other subjects, or operating political action committees ("PACs") to raise money from certain individuals, write PAC checks to campaigns, and spend PAC money on independent expenditures. A corporation may use corporate resources to solicit funds from and communicate express advocacy to its "restricted class." This group varies for business corporations, membership organizations, and trade associations. Generally, it includes each entity's salaried, professional, or policy-making employees; shareholders (if any); and these groups' family members at home. A membership organization or trade association must meet six organizational criteria, and members must have some significant tie to the association such as paying annual dues each year to fit within the association's restricted class.

What can I do now?

Most associations may now communicate just about any political message they want, short of asking the public for PAC contributions or coordinating their communications with a campaign or political party. Before *Citizens United*, only media organizations and certain nonprofits that met restrictive FEC "qualified nonprofit" criteria could urge the public to vote for or against a particular candidate. Associations that publish mixed member services/news websites or periodicals no longer need to fret over whether they meet the FEC's "press exemption" or "qualified nonprofit" criteria.

For instance, an association no longer needs to refrain from using language in mixed member/public mailings the FEC might deem an independent expenditure, such as lauding one candidate's environmental record, faintly praising the other's, and urging the reader to "Vote Your Conscience." In our experience, associations often held back before *Citizens United* from speaking out on important campaign issues for fear of attracting an FEC enforcement proceeding and possible fine. Associations that hosted blogs worried that a user-written post or tweet might subject the organization to penalty if the content included express advocacy. Fear of walking into an FEC penalty for even inadvertent, user-posted political speech should now be gone.

Considerations for Communications Beyond the Membership

When making use of these new rights to communicate with the public, there are four important issues to keep in mind.

1. Coordination

Under the campaign finance rules, an independent expenditure may not be "coordinated" with a campaign. An independent expenditure becomes a "contribution" when it is coordinated. Even after *Citizens United*, contributions are still illegal for corporations (and limited to $2,500 per candidate per election for individuals and $5,000 per candidate per election for multicandidate PACs). Broadly speaking, coordination means consulting with or discussing the communication with a campaign.

The coordination rules are complicated. They include using common vendors to produce communications or making a communication because a campaign requested it. One common issue is sharing a draft newsletter article with a campaign's press office for edits before publication, which should not be done. Similarly, the association may link to campaign materials such as a candidate's speech on YouTube, but it may not discuss republishing campaign materials on its own website with campaign staff.

Associations often wish to learn about a candidate's positions on the issues so they can determine whom to endorse or to create voter guides. As long as these communications do not involve a discussion of the campaign's plans, activities, or needs, the association may make inquiries about the candidate's positions on issues.

Finally, is worth noting that if the communication is going only to members (and remember, the FEC defines who is or is not a member), then the association may coordinate the communication with the campaign. Limiting the audience to association members who also meet the FEC's definition may be worthwhile if the association wants to discuss the communication with the candidate or campaign staffers.

2. Disclaimers and Disclosure

Communications that expressly advocate for or against a candidate must include a disclaimer stating who paid for them; the payer's address, web address, or phone number; and that they are not authorized by a candidate. This is fairly simple for advertisements, but may be a little more

complicated for articles in newsletters. Fortunately, Internet-based communications sent via email or posted to a website without a fee do not need disclaimers.

Disclosure can be a bit more complicated. An association that makes very infrequent express advocacy messages should consider communicating these messages through email, its Internet website, or another's website so long as the other website does not charge a fee. This would cover occasional "vote for/against" statements in an online newsletter's "Message from the President" column. E-mail and most online content have no direct cost that one can attribute to a members-only express advocacy or independent expenditure communication. If the expenditure is low enough, no report is required.

Spending more than $250 in the aggregate during a calendar year on independent expenditure communications to the public triggers a quarterly reporting requirement. Spending $10,000 in a calendar year will require filing a report within 48 hours. And spending an aggregate of just $1,000 in the 20 days before the election will require filing a report within 24 hours.

For messages sent to an association's restricted class, spending $2,000 per election will trigger an internal express advocacy reporting requirement unless the communication was primarily devoted to other subjects (for instance, one small article within a member magazine).

3. Tax Issues

Federal tax law imposes additional restrictions on nonprofits' political activity. For example, 501(c)(3) organizations may not spend any money to intervene in an election, such as by endorsing a candidate in a newsletter or paying for an independent expenditure. This rule is strictly enforced and can result in loss of tax status. Other rules include the "multiple clicks" requirement for 501(c)(3)s' websites to avoid direct links to political content on other websites. Thus, 501(c)(3) organizations should consult counsel experienced in nonprofit tax and political activity before linking to election-related content.

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." The IRS has announced plans to increase scrutiny of 501(c)(6) and 501(c)(4) political activity, so care must be taken.
Finally, permissible nonprofit association political speech may also trigger a 35 percent proxy tax on the total communication cost (or on net investment income for the organization, whichever is lower). And business corporations cannot deduct the cost of their lobbying or election-related activities on their income tax returns as business expenses.

4. Super PACs

Finally, an association may have another choice to make if it will be heavily involved in independent expenditures. That is, it may consider forming what is called a "Super PAC" to centralize its public express advocacy communications. This is really an issue for an association that plans to make large outlays (as opposed to including express advocacy within one newsletter's article). Centralizing costs and communications in a Super PAC can help avoid failing to file quarterly and 24- or 48-hour reports. This entity can speak freely and raise money from anyone—the association, corporations, or individuals. Moreover, the Super PAC's reports may disclose the association as the donor, rather than individual or corporate members.

* * *

In sum, the *Citizens United* decision opened many new avenues to associations, freeing them to communicate express advocacy beyond just their members. Associations must be careful about how they do it, know if and when they need to file FEC reports, and whether disclaimers are needed. Associations certainly now have a whole new world of opportunities that were not available before.

* * *

For more information on nonprofit organizations and political activities, contact the authors at or 202.344.8215 and or 202.344.4541.

VENABLE® LLP

Articles

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Lobbying: What Does It Mean for Nonprofits?

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SUMMARY

Nonprofit organizations that conduct federal lobbying must be cognizant of at least two different definitions of lobbying in order to comply with applicable federal tax law and federal lobbying disclosure laws.

The Internal Revenue Code (the "Code") sets forth different requirements and definitions for organizations recognized as exempt under Section 501(c)(3) than the requirements imposed on trade and professional organizations exempt under Section 501(c)(6) and labor unions and farm bureaus exempt under Section 501(c)(5). While the Code includes a definition of lobbying that applies specifically to public charities exempt under 501(c)(3); trade and professional associations and labor unions and farm bureaus are subject to the obligations set forth in Section 162(e) of the Code. The federal Lobbying Disclosure Act (the "LDA") applies to all nonprofit organizations and provides a different definition of "lobbying," which requires organizations to track and disclose the amount spent on such activities. Set forth below are the different definitions and reporting requirements for 501(c)(3) public charities and other non-501(c)(3) tax exempt organizations under the federal tax law and under the LDA.

FEDERAL TAX LAW

SECTION 501(c)(3) PUBLIC CHARITIES

Nonprofit organizations that qualify for federal income tax exemption as public charities under **Section 501(c)(3)** of the Code are subject to heightened restrictions on lobbying and political activities. Carrying on propaganda, or otherwise attempting to influence legislation may not constitute a "substantial part" of the activities of an organization exempt under Section 501(c)(3); exceeding the "substantial part" limit places an organization at risk of losing its exempt status. Further, such organizations are prohibited from engaging in any political activities. Whether an organization's attempts to influence legislation are substantial will be determined by a vague facts and circumstances "substantial part" test, unless an organization elects to have such determination made pursuant to an expenditure test, by filing a 501(h) election with the Internal Revenue Service ("IRS").

The No Substantial Part Test

Under the substantial part test, codified in part in Section 1.501(c)(3)-1(c)(3)(ii) of the Treasury Regulations, an organization's tax exempt status will not be at risk because of lobbying, provided such organization is not classified as an "action" organization, or an organization, "a substantial part of its activities is attempting to influence legislation by propaganda or otherwise." The definition of lobbying under the substantial part test includes the following:

- Attempts to influence legislation by propaganda or otherwise;
- Presentation of testimony at public hearings held by legislative committees;
- Correspondence and conferences with legislators and their staffs;
- Communications by electronic means; and
- Publication of documents advocating specific legislative action.

Legislation is defined to include action by Congress, a state legislature, a local council or similar governing body, and the general public in a referendum, initiative, constitutional amendment, or similar procedure.

The IRS has not defined “substantial” and a determination of whether an organization’s lobbying activities are substantial is generally based on a facts and circumstances analysis. In some cases the IRS has taken into consideration the percentage of the organization’s expenditures devoted to influencing legislation on an annual basis. In others, it has determined substantiality based on the percentage of the organization’s activities that constitute influencing legislation. In a very early case, *Seasongood v. Commissioner of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955), it was found that use of approximately 5% of an organization’s time and effort was “insubstantial.” Later, the Tenth Circuit rejected the use of percentages to classify activity as substantial or insubstantial. *See Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1974). Two years after *Christian Echoes*, however, the Court of Claims continued to use the percentage test to find that an organization’s lobbying activities were substantial when 16.6% to 20.5% of the organization’s total expenditures over a four year period were for lobbying. *See Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). To date, the IRS has not offered further clarification on the point at which an organization’s lobbying activities will be deemed substantial or set any type of threshold which an organization must not exceed, and therefore organizations following this rule alone operate with some level of uncertainty.

Further, if an exempt organization exceeds an “insubstantial” amount of lobbying activity, a tax in the amount of five percent of the lobbying expenditures may be imposed on the organization, for each year that lobbying expenditures were incurred. If the IRS finds that the organization's managers made decisions to undertake lobbying activity knowing that such activity was likely to result in a revocation of the organization's exempt status, an additional five percent tax may be levied on such managers.

The 501(h) Election

Limits on Lobbying

Alternatively, organizations exempt under Section 501(c)(3) that intend to engage in lobbying activity may choose to make the so-called “lobbying election” under **Section 501(h)** of the Code. Electing organizations are governed by the “**expenditure test**,” a mathematical formula that limits the amount a 501(c)(3) entity may spend on lobbying activities to precise amounts and provides specific definitions of “lobbying.” **Section 4911(c)(2)** of the Code sets forth the manner of calculating the lobbying ceiling, or nontaxable amount, which is the lesser of $1,000,000 or amounts determined on a sliding scale based on the organization's exempt purpose expenditures. This scale is as follows:

If the exempt purposes expenditures are:	The lobbying nontaxable amount is:
Not over $500,000	20 percent of the exempt purpose expenditures
Over $500,000 but not over $1,000,000	$100,000, plus 15 percent of the excess of the exempt expenditures over $500,000
Over $1,000,000 but not over $1,500,000	$175,000 plus 10 percent of the excess of the exempt purpose expenditures over $1,000,000
Over $1,500,000	$225,000 plus 5 percent of the excess of the exempt purpose expenditures over $1,500,000

In addition, the amount of grassroots lobbying expenditures may not exceed 25 percent of the permitted overall lobbying expenditures. If an organization exceeds its lobbying expenditure limit in a given year, it must pay an excise tax equal to twenty-five percent of the excess. The 501(h) election may be made at any time by filing the one-page **Form 5768** with the IRS.

Lobbying Defined

For the purposes of calculating lobbying expenditures under the 501(h) election, there are two types of “lobbying”:

. “**Direct lobbying**” is any attempt to influence legislation through communication with a member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation. “Direct lobbying” also includes communications by an organization to its members, directly encouraging those members to engage in direct lobbying.
. “**Grassroots lobbying**” is any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof. An organization engages in “grassroots

lobbying" when, directly or through its members, it urges the public to contact legislators, provides the public with contact information for a legislator, or identifies a legislator's position on a pending legislative matter.

For both direct and grassroots lobbying, the costs of researching, preparing, planning, drafting, reviewing, copying, publishing, and mailing—including any amount paid as compensation for an employee's services attributable to these activities—must be treated as lobbying expenditures. The allocable portion of administrative, overhead, and other general expenses attributable to "lobbying" count as lobbying expenditures as well.

Several activities are expressly exempt from this definition of lobbying, even if they express a position on a pending legislative matter:

. Lobbying does not include providing technical assistance or advice to a governmental body or committee in response its unsolicited, written request, provided that (a) the request comes from more than one member of the body or committee, and (b) the response is made available to every member of the body or committee.
. Lobbying does not include so-called "self-defense activities"—i.e., communications concerning decisions that may affect an organization's existence, powers, duties, 501(c)(3) status, or deductibility of contributions.
. Lobbying does not include nonpartisan analysis, study, or research that may advocate a particular view, provided that (a) presentation of the relevant facts is sufficient to enable readers to reach an independent conclusion, and (b) distribution of the results is not limited to or directed toward persons solely interested in one side of a particular issue.

NON-501(c)(3) ORGANIZATIONS

Section 162(e)

Section 162(e) of the Code denies a deduction for the amount an organization spends on lobbying. Most trade and professional organizations exempt under 501(c)(6) and labor unions and farm bureaus exempt under 501(c)(5) are subject to the requirements of Section 162(e) (as are most taxable business entities). Membership organizations that are subject to Section 162(e) and that conduct lobbying may either: (1) disclose to their members what percentage of their dues are nondeductible because they are used for lobbying; or (2) pay a 35-percent proxy tax on lobbying expenditures. Regardless of the method chosen, they must disclose the amount spent lobbying on their Form 990 informational returns. Most membership organizations choose to report the nondeductible amount to their members.

"**Lobbying**" under Section 162(e) includes five broad categories of activity:

. Influencing legislation. Any attempt to **influence legislation** through communication with (i) any member or employee of Congress; (ii) any member or employee of a state legislature; or (iii) any federal or state government official or employee who may participate in the formulation of legislation.
. Grassroots lobbying. Any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referenda. This includes urging association members to engage in grassroots lobbying.
. Communications to covered federal executive branch officials. Any direct communication with a covered federal executive branch official in an attempt to influence the official actions or positions of such official. Covered federal executive branch officials include the President, the Vice President, employees of the Executive Office of the President, and any individual serving in Executive Schedule level I or designated by the President as having Cabinet level status, and any immediate deputy of any of the foregoing.
. Political activities. Any activity which constitutes participation or intervention in any political campaign at the federal, state, or local level, the expenditures for which are not already subject to tax under Code Section 527(f).
. Supporting activities. All research, preparation, planning, and coordination (including deciding whether to make a lobbying communication) engaged in for a purpose of making or supporting a lobbying communication or political activity (as defined above) is treated as carried out in connection with such communication or activity. In other words, the time spent on any background activity engaged in for a purpose of supporting a future planned lobbying communication must also be counted as lobbying.

The **regulations implementing Section 162(e)** state that a covered organization may use any reasonable method to calculate the amount spent on lobbying. An accurate calculation typically includes tracking employees' time spent lobbying, allocating overhead costs to lobbying activity, and factoring actual lobbying expenses (e.g., travel, payments to outside consultants, publications, etc.) into the total. The regulations also permit an organization to make reasonable allocations for activities that are conducted for both lobbying and non-lobbying purposes.

LOBBYING DISCLOSURE ACT

In addition to complying with the tracking of lobbying activities under federal tax law, nonprofit organizations that lobby also may be **required to register** under the LDA if one or more of their employees spends more than twenty percent of his or her time on lobbying activities, and to submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. The LDA applies to taxable as well as tax-exempt entities and does not make a distinction between Section 501(c)(3) public charities and other nonprofit organizations. The LDA definition of "lobbying" differs significantly from the definition used under Section 162(e) or for the 501(h) election.

Under the LDA, "**lobbying activities**" include "lobbying contacts" as well as efforts in support of such contacts, including preparation and planning activities, research, and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

Under the LDA, "**lobbying contacts**" are the actual communications with "covered officials." Lobbying contacts may be oral, written, or electronic. A contact is not a lobbying contact unless it involves:

- The formulation, modification, or adoption of federal legislation;
- The formulation, modification, or adoption of a federal rule, regulation, Executive Order, or other program, policy, or position of the United States government;
- The administration or execution of a federal program or policy (including the negotiation, award, or administration of a federal contract, grant, loan, permit, or license); or
- The nomination or confirmation of a person for a position subject to confirmation by the Senate.

There are a number of **exceptions** to these four categories. The following exceptions do not constitute "lobbying contacts" (and therefore preparation for such contacts does not constitute "lobbying activity") and are particularly relevant to nonprofit organizations:

- Administrative requests, such as requests for a meeting or about the status of a matter;
- Testimony given before a committee or sub-committee of Congress;
- Speeches, articles, or publications made available to the public or distributed through radio, television, or other methods of mass communication;
- Information provided in writing in response to a request by a covered official;
- Information required by subpoena, a civil investigative demand, or otherwise compelled by the federal government (including information compelled by a contract, grant, loan, permit, or license);
- Communications in response to a notice in the Federal Register and directed toward the official listed in the notice;
- Written comments filed in the course of a public meeting;
- Any communication that is made on the record in a public proceeding; and
- Petitions for agency action made in writing and made part of the public record.

The term "**covered legislative branch official**" includes all elected Members of Congress and the Senate, as well as all employees and officers of Congress. The definition of "**covered executive branch officials**" is more specific. It includes:

- The President;
- The Vice President;
- Any member of the uniformed services whose pay or grade is at or above O-7;
- Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
- Any officer or employee in a position listed in levels I though V of the Executive Schedule; and,

. Schedule C political appointees.

The "**Executive Schedule**" delineates the most senior positions in the administration. **Schedule C** posts are typically non-career policymaking or "political" appointees, and confidential secretaries and administrative assistants of key appointees within an agency.
Even if a communication is directed to a covered official—e.g., a Schedule C appointee at a government agency—it is not a lobbying contact if the communication is otherwise made part of the public record before the agency (e.g., through a formal docketing process).

Reporting Expenses under the LDA

Although many organizations will be subject to both Code and LDA reporting requirements for lobbying, a provision of the LDA permits organizations to track and disclose lobbying expenditures using the Section 4911 definition rather than the LDA definition. For many organizations, the LDA definition is far narrower than "lobbying" as it is described in the Code.

Nonprofit organizations that are sensitive to having high dollar amounts reported on their LDA reports may consider opting to track lobbying activities separately under both the Code and the LDA. This approach will increase recordkeeping obligations, but will likely allow an organization to report a lower, more accurate estimate of federal lobbying expenditures to the Clerk of the House and the Secretary of the Senate, because state lobbying and grassroots lobbying expenses are not reported under the LDA.

ADDITIONAL RESOURCES

Statues, Regulations, and Other Government Resources

For Tax-Exempt Entities

- **Tax Information for Charities & Other Non-Profits**, Internal Revenue Service
- IRS Summary of "**501(c)(3) Lobbying**"
- IRS Summary of "**Measuring Lobbying - Substantial Part Test**"
- IRS Summary of "**Measuring Lobbying - Expenditure Test**"
- IRS Summary of "**Nondeductible Lobbying and Political Expenditures**"
- IRS Summary of "**Political Campaign and Lobbying Activities**"

For LDA Registrants

- **Office of Public Records**, U.S. Senate
- **Office of the Clerk**, U.S. House of Representatives
- ***Lobbying Disclosure Act Guidance***, Office of the Clerk, U.S. House of Representatives
- *United States Government Policy and Supporting Positions* (the "**Plum Book**"), listing all employees of the federal government (including Executive Schedule and Schedule C employees)
- **5 U.S.C. § 7511(b)(2)**, defining Schedule C employees

Venable Resources

- **Playing Politics: A Menu of Options for Associations to Consider** (September 2011)
- **Grassroots Lobbying: A Legal Primer** (Summer 2011)
- **Federal Ethics and Lobbying Rules** (May 2011)
- **Mythbusting the Top 10 Fallacies of 501(c)(3) Lobbying** (December 2010)
- **Effective 501(c)(3) Lobbying: 501(h) Election, No Substantial Part, Creating Related Lobbying Organizations** (August 2010)
- **Myths about Lobbying, Political Activity, and Tax Exempt Status** (June 2010)
- **Supreme Court Decision Opens New Doors for Associations** (February 2010)
- **The New Form 990: Defusing Governance, Political Activities, Compensation, and Other Issues** (December 2009)
- **The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203** (June 2008)
- **The Lobbying Tax Law: Model Lobbying Tax Compliance Guide for Association Employees** (May 2001)
- **Limitations on Lobbying Activities: Guidelines for 501(c)(3) Organizations** (July 2000)
- **Lobbying Tax Law: A Summary and Overview for Associations** (1999)

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[1]Note that this brief article does not discuss the application of 501(c)(3) lobbying restrictions to private foundations.

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VENABLE® LLP

Articles

December 1, 2010

Mythbusting the Top 10 Fallacies of 501(c)(3) Lobbying

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Many 501(c)(3) organizations shy away from lobbying and other politically-related activities out of concern for their tax status. But by failing to engage in such activities, nonprofit organizations may be neglecting tools at their disposal that can be enormously helpful in carrying out their mission.

Myths abound about the permissible—or, more often, impermissible—lobbying and political activities of nonprofit organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. But the fear factor often is unwarranted. 501(c)(3) organizations certainly are limited in the amount of lobbying in which they may engage and are prohibited from engaging in political campaign activity. However, knowing which actions are lobbying or political campaign activity and how to account for those activities are critical questions that need to be answered before leaders of 501(c)(3) organizations unnecessarily inhibit their organizations from most fully and effectively furthering their missions. This article explores and debunks some of the most common misconceptions in this area.

Myth 1. 501(c)(3)s cannot lobby and will lose their tax exemption if they engage in lobbying.

Absolutely not. 501(c)(3) organizations can—and often should in order to fully carry out their missions—lobby at all levels of government. Federal tax law always has permitted lobbying by 501(c)(3) organizations, as long as lobbying is not a "substantial part" of an organization's total activities. There are two ways to determine what is substantial: the facts and circumstances test articulated by the IRS and courts and the more definitive "501(h) election."

Facts and Circumstances: The facts and circumstances test is not clearly articulated and includes expenditures for lobbying, staff time, volunteer time, and other activities. It does not specify exactly how much of an organization's funds or time may be spent on lobbying, nor does it specify exactly what constitutes lobbying. The sole penalty for violating the "substantial part" test is revocation of tax-exempt status.

501(h) Election: The statute and regulations governing organizations that make the 501(h) election are clear on which activities constitute lobbying and which do not; there also are numerous exceptions from the definition of lobbying. For example, lobbying occurs only when there is an *expenditure of money* by the 501(c)(3) organization for the purpose of attempting to influence legislation. Where there is no expenditure by the organization for lobbying (such as lobbying by members or volunteers), there is no lobbying by the organization. Generally, organizations that make the 501(h) election are subject to a sliding scale limit on their lobbying expenditures:

Exempt Purpose Expenditures	Percentage Allowed for Lobbying	Total Maximum Lobbying Amount
$0 to $500,000	20%	Up to $100,000
$500,001 to $1,000,000	15%	$100,000 plus 15% of excess over $500,000
$1,000,001 to $1,500,000	10%	$175,000 plus 10% of excess over $1,000,000
Over $1,500,000	5%	$225,000 plus 5% of excess over $1,500,000, up to a maximum lobbying expenditure limit of $1,000,000

As shown in the chart, there is an overall cap of $1 million on lobbying expenditures (which is reached when an organization reaches $17 million in total exempt purpose expenditures). Thus, with this hard cap on the amount of money that may be spent on lobbying, large 501(c)(3) organizations may not be able to make use of the 501(h) election. In addition, no more than 25 percent of the amount allowed to be spent on lobbying generally may be for grassroots lobbying. There are financial penalties for exceeding the lobbying limits; revocation of tax-exempt status is only possible where there are

repeated, excessive violations of the limits.

Myth 2. Making the 501(h) election will increase the risk of our organization becoming the target of an IRS audit.

The opposite is actually more likely. If a 501(c)(3) organization does not make the 501(h) election, it is governed by the much more ambiguous "substantial part" test. Thus, if an organization lobbies but does not make the 501(h) election, the organization's lobbying must be "insubstantial." This is a vague term that has never been clearly defined. If you remain subject to this rule, you cannot be certain how much lobbying your organization can do—or even what is and is not "lobbying."

Further, the IRS has made clear that far from singling out for audit 501(c)(3) organizations that make the election, the reverse is true. The IRS has stated, "… our intent has been, and continues to be, one of encouragement [of 501(c)(3) organizations] to make the election … Experience also suggests that organizations that have made the election are usually in compliance with the restrictions on lobbying activities."

Some 501(c)(3) organizations also have been reluctant to make the 501(h) election for fear that this action will change their 501(c)(3) status. This is not true. Electing organizations remain fully exempt under section 501(c)(3) of the Internal Revenue Code.

Myth 3. 501(c)(3) organizations are not covered by federal and state lobbying registration requirements.

Yes, they are. Under the federal Lobbying Disclosure Act of 1995 ("LDA"), a 501(c)(3) organization—like all other entities—is required to register and file quarterly reports concerning its lobbying activities if (1) the organization has at least one employee who is a "lobbyist" and (2) the organization incurs or expects to incur expenditures on "lobbying activities" of $11,500 or more in a calendar quarter. Note that a "lobbyist" is someone who makes at least one "lobbying contact" and devotes at least 20 percent of his or her time to "lobbying activities."

501(c)(3) organizations that have elected to report lobbying expenditures for tax purposes under section 501(h) of the Internal Revenue Code may use the tax law definition of "influencing legislation" and the tax rules for computing lobbying expenditures for purposes of making quarterly reports under the LDA.

In addition to the federal requirements, each state has its own lobbying registration and reporting requirements. These laws have a variety of different triggers, but generally do not exempt 501(c)(3) organizations from their registration and reporting requirements. In addition, many states require organizations to register and report even if they use only outside lobbyists (that is, no employees meet the registration thresholds). This is different from the federal system, where organizations do not have to report if all of their lobbying is done by outside firms.

Myth 4. Encouraging the members of a 501(c)(3) organization to contact their legislators with respect to pending legislation is grassroots lobbying and is more limited than direct lobbying.

Not true. Under Section 501(h), the definition of "grassroots lobbying" includes only attempts by a 501 (c)(3) organization to influence legislation through an attempt to change the opinion of the general public. This is not to be confused with trying to get the members of the 501(c)(3) organization mobilized to support or oppose legislation by contacting their elected officials; encouraging members to contact a legislator is direct lobbying if the organization has made the 501(h) election. *Only when a 501(c)(3) organization tries to reach beyond its membership to get action from the general public does grassroots lobbying occur.*

Note that the facts and circumstances test does not distinguish between grassroots and direct lobbying or explain the difference. However, organizations that do not make the election do need to be cognizant that advocating to the general public can trigger a separate prohibition on 501(c)(3)s becoming an "action" organization.

Myth 5. If an expenditure has any lobbying purpose, it must be allocated entirely to lobbying.

Again, not true. 501(c)(3) organizations are required to allocate costs between lobbying and non-lobbying. Costs of communications with members may be reasonably allocated between lobbying and any other *bona fide* purpose (*e.g.*, education, fundraising, etc.) on any reasonable basis. For communications with nonmembers, all costs attributable to the lobbying portion and to those parts of the communication that are on the same specific subject as the lobbying message must be included as lobbying expenditures. Other cost allocation rules apply as well; for instance, allocation is not permitted for grassroots lobbying expenditures.

Myth 6. A 501(c)(3) cannot provide its members with the voting records of legislators on key issues.

Yes, it can. 501(c)(3) organizations can tell their members how each member of a legislature voted on key issues. While 501(c)(3)s are prohibited from engaging in any political campaign activities, they may disseminate voting records during political campaigns, though such communications should be crafted carefully. However, a problem may arise if an organization waits to disseminate voting records until a political campaign is underway. If your organization has not published records regularly throughout the year, it may be at risk of violating the prohibition on political campaign activity if it were to publish a recap of votes throughout a legislative session at the time that the campaign is underway.

Myth 7. 501(c)(3)s cannot inform candidates of their organizations' positions on key issues and ask for their support.

You can within limits. A 501(c)(3) organization may inform political candidates of its positions on particular issues and urge them to go on record, pledging their support of those positions. Candidates may distribute their responses (with respect to those positions) both to the members of the 501(c)(3) organization and to the general public. However, 501(c)(3) entities should avoid publishing or distributing *statements* by candidates except as nonpartisan "questionnaires" or as part of *bona fide* news reports.

501(c)(3) organizations with a broad range of concerns can more safely disseminate responses from questionnaires. However, the questions must cover a broad range of subjects, be framed without bias, and be given to all candidates for office. If a 501(c)(3) organization has a very narrow focus, this may pose a problem. The IRS takes the position that a 501(c)(3)'s narrowness of focus implies endorsement of candidates whose replies are favorable to the questions posed. *Unless you are certain that your organization clearly qualifies as covering a broad range of issues, your organization should avoid disseminating replies from questionnaires.*

Finally, it is important to remember that 501(c)(3) organizations may not ask candidates to sign "pledges" to support the organization's positions. Doing so may result in political intervention, which is strictly prohibited.

Myth 8. Employees of 501(c)(3) organizations cannot participate in a candidate's campaign for elective office.

Not true. It is true that a 501(c)(3) organization is prohibited from endorsing, contributing to, working for, or otherwise supporting or opposing a candidate for public office. However, this does not prohibit the officers, directors, members, or employees of a 501(c)(3) organization from participating in a political campaign, provided that they say or do everything as private citizens and not as spokespersons for or agents of the organization, and not while using the organization's resources or assets in any manner.

Myth 9. 501(c)(3) organizations *can* make independent expenditures in support of political candidates in light of the U.S. Supreme Court's decision that corporations may expressly advocate for or against candidates.

No. Although the *Citizens United v. FEC* decision allowed for corporations—both for- and nonprofit—to fund messages to the general public that expressly advocate the election or defeat of a clearly identified candidate for federal office, the decision does not apply to the tax law restrictions on 501(c)(3) organizations. The U.S. Supreme Court has long held that because of the tax benefits that come with being a 501(c)(3) organization, they may be precluded from engaging in political campaign activities.

Myth 10. 501(c)(3)s cannot set up affiliated organizations for use in engaging in unlimited lobbying and certain political activities.

Not true. The U.S. Supreme Court has said that 501(c)(3)s *can* establish affiliated 501(c)(4)s, 501(c)(6)s or other tax-exempt affiliates (except Section 527 organizations, which include political action committees ("PACs")) to carry on unlimited lobbying activities and otherwise permitted political campaign activities. In fact, an affiliated 501(c)(4) or (c)(6) entity could, itself, establish a connected PAC. The affiliated entity generally must have independent funding sources for which no charitable tax deduction will be available.

There are certain ways for the 501(c)(3) to provide support to its affiliated organizations. In general, however, if a 501(c)(3) transfers money, assets or anything of value to a non-501(c)(3) organization that lobbies, then the transfer will be treated as a lobbying expenditure of the 501(c)(3) unless it fits within certain protected categories. Moreover, the related organization that receives general support from the 501(c)(3) entity may not engage in political campaign activities. There are two ways for the 501(c)(3) to provide support to the related organizations without the support being treated as lobbying or political

activity.

First, if the 501(c)(3) receives compensation of fair market value in return from the related organization, then no lobbying expenditures will be attributed to the 501(c)(3). Examples include leased office space, office services, and staff services in return for full reimbursement of the costs of the goods or services provided.

Second, if the support is made using a “controlled grant,” whereby the resources or assets transferred are limited to a specific non-lobbying (or non-political) project of the transferee with proper documentation of the control and segregation of funds, then the expenditure will not be treated as one made for lobbying.

Thus, *general purpose* support by a 501(c)(3) of an affiliated non-501(c)(3) is permitted (presuming it falls within the scope of the 501(c)(3)’s mission) but will be treated as a lobbying expense of the 501(c)(3) subject to the limitations on lobbying discussed above. Moreover, the affiliated entity may not engage in political campaign activities.

Finally, it should be noted that the IRS pays close attention to ensure that the operations of a 501(c)(3) organization and its affiliated entities are clearly separate. Absent such separateness, the IRS might hold that the activities of an affiliated organization are attributable to the 501(c)(3) organization, with potentially significant adverse consequences.

* * * * *

501(c)(3) Lobbying and Political Activity
QUICK REFERENCE CHART

Lobbying	Yes, and can advocate for or against specific legislation
Expenditure limits	Yes, with a sliding scale if organization makes 501(h) election
Federal lobbying disclosure	Yes, if threshold met
Legislator scorecards / voting records	Yes, with limitations
Political Action Committees	Prohibited
Endorsing candidates	Prohibited
Contributions to candidates	None
Voter registration drives and education	Yes, but must be nonpartisan and focused on need to vote
Express advocacy	Prohibited

* * * * *

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VENABLE LLP

Political Law Toolkit

SEPTEMBER 2012

Electioneering Communications

VENABLE LLP ON POLITICAL LAW

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Political Law Toolkit

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Electioneering Communications

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2 U.S.C. § 434(f)(3)(A) defines an electioneering communication ("EC") as any broadcast, cable or satellite communication that fulfills each of the following conditions:

- The communication refers to a clearly identified candidate for federal office (this condition is met if a communication contains the candidate's nickname, name, image or makes any unambiguous reference to the person or their status as a candidate).
- The communication is publicly distributed shortly before an election for the office that candidate is seeking (the EC rules apply only 60 days before a general election or 30 days before a primary). For example, electioneering communications rules apply now regarding either candidate for president because we are 60 days before the general election.
- The communication is targeted to the relevant electorate (U.S. House and Senate candidates only). This means the communication can be received by 50,000 or more people in the district (House candidates) or state (Senate candidates).

When Disclosure is Required

Disclosure of ECs is required when a person or organization makes electioneering communications that aggregate more than $10,000 in a calendar year. All EC reports are 24-hour reports, meaning it must file FEC Form 9 by 11:59 p.m. on the day following the disclosure date. The disclosure date is the date that the communication is first publicly distributed. Note that for each separate time costs aggregate to more than $10,000, an additional report is due within 24 hours of the disclosure date.

For example, say an organization makes an electioneering communication (TV ad) that costs $50,000 of air time and $10,000 in production costs, and it will be aired for one week. You would disclose this one time within 24 hours of the TV ad first airing, with $60,000 as the cost.

The organization then wants to run the same ad two weeks later. The organization pays $50,000 for the air time (no new production costs). You would file another disclosure report for this within 24

hours of the ad being publicly distributed again.

Contents of Disclosure Report

The 24-hour reports must include:

- The name and principal place of business of the person or organization making the disbursement
- The name, address, employer and occupation of any persons sharing or exercising control over the organization (e.g., officers/directors)
- The name, address and occupation of the custodian of records for the entity making the expenditure
- The title of the communication (title of the TV ad, etc.)
- The name and office of a clearly-identified federal candidate in the communication, and the election/year to which the communication pertains
- The date of public distribution
- The name and address of all vendors to whom disbursements over $200 were made; also the amount and date
- A purpose description of the disbursement—this must include the title of the communication (e.g., "Production Costs – Insert Title of Communication Here")
- The name and address of each donor who has given more than $1,000 since the previous calendar year (January 1, 2011).

Disclosure of Donors

The disclosure of donors to electioneering communications has undergone a recent shift. The FEC regulation on this used to require disclosure of only those donors who intended for their donations to be used for electioneering communications. A recent court decision struck down that regulation, and the FEC is now complying with the court's order that *all* donors be disclosed if they meet the $1,000 threshold (going back to January 1, 2011), regardless of intent. This does not, however, include membership fees or dues because they are not considered donations. It may be wise for organizations to consider opening a separate "government affairs" type of account into which donations other than membership fees or organization dues would go so that it's easy to know which donors will be disclosed on these reports.

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HOSTING A FEDERAL CAMPAIGN FUNDRAISER ON ASSOCIATION PROPERTY

Federal campaign finance law restricts incorporated associations' expenditure of association funds or resources to host a federal campaign-related event such as a fundraiser. This White Paper discusses four permissible means of hosting a fundraiser on association property.

PERMISSIBLE CAMPAIGN-RELATED EVENTS

1. Association-Paid "Restricted Class" Event

Federal campaign finance law permits an incorporated association to host a candidate (or campaign or political party representative) "appearance" at its event, subject to the following restrictions:

- *Permissible Attendees*
  - The association may invite its "restricted class."[1]
  - A small number of other employees may also attend if their participation is necessary to administer the event (*e.g.*, non-restricted class catering staff or meeting planners) but they should not be solicited.
  - Other guests of the corporation who are

[1] This includes an incorporated association's decision-making employees, certain individual members (*e.g.*, those who pay dues on an annual basis) and their families. "Decision-making" employees are salaried, with "policymaking, managerial, professional or supervisory responsibilities." This specifically includes the "individuals who run the corporation's business such as officers, other executives, and plant, division, and section managers;" members of the association's board of directors if they receive regular compensation; and "individuals following the recognized professions, such as lawyers and engineers." The restricted class does not include non-employee consultants, vendors, "[p]rofessional [employees] who are represented by a labor organization" and "[s]alaried foremen and other salaried lower level supervisors having direct supervision over hourly employees."

speaking or being honored at the event and representatives of the news media[2] also may attend.

- *Candidate Selection*
  - The association may invite any federal candidate or representative of a federal campaign or political party.
  - It may refuse campaign or parties' requests and need not invite opposing candidates or parties to the same or a later event.

- *Solicitations and Handling Contributions*
  - Campaigns and parties may solicit and receive contributions before, during, or after the event.
  - Association representatives may suggest contributing but may not in any way accept or handle contributions before, during, or after the event.

Federal Election Commission ("FEC") rules also permit candidate appearances at association events that involve employees who are not within the restricted class. Such events involve additional restrictions. For example, the association may not suggest that attendees make contributions, the candidate may not collect contributions at the event (although leaving behind contribution materials is permitted) and the association must honor requests by opposing candidates for similar appearances at association-paid events.

2. Campaign-Paid Event

Some campaigns prefer to pay fundraiser costs directly as operating expenses. Asking the campaign's preference should be one of the first questions when planning the event.

- Some campaigns will not accept direct or in-kind contributions from PACs or individuals/entities registered under the Lobbying Disclosure Act ("LDA").

- As a rule of thumb, most campaigns are comfortable paying five percent of the amount they expect to raise at the event.

If the campaign agrees to pay the event's costs, the association should invoice the campaign and receive

[2] Certain equal-access requirements apply if the association invites a news media representative, but campaign fundraisers seldom are open to the media.

advance payment in full for (a) employees' compensation, benefits and overhead if the association asks subordinates to assist with planning, organizing, or carrying out of the fundraiser; (b) use of the association's lists of customers, clients, or vendors in connection with sending invitations or soliciting contributions; and (c) catering or food services. If a campaign or individual other than an employee of the association uses the association's office space and equipment in connection with a federal campaign, the association must be reimbursed within a commercially reasonable time.

3. PAC- or Individual Contributor-Paid Event

Any payment by a PAC or individual[3] to organize a fundraiser is an in-kind contribution that counts toward the applicable per-election contribution limit for that candidate.

- The association must invoice the PAC or individual contributor *before* the event for reimbursement of any cost the association incurs (meeting space, employee compensation, etc.).

- Only the PAC or individual volunteers, not the association, should be identified as the event hosts.

- Invitations must not use the association's letterhead; PAC letterhead is permissible.

- Invitations may list the individual hosts' employers and job titles for identification purposes but should not indicate any involvement by the employer in the event.

- Employees who organize and attend fundraisers should do so as campaign volunteers. Employees' time spent volunteering incurs no compensation cost to the association and therefore requires no reimbursement or disclosure.
    - Only decision-making employees who have the flexibility to control their own work schedules or unpaid board members may volunteer. The FEC presumes that hourly or support staff who are involved in campaign-related events act as employees, not bona fide volunteers.
    - A decision-making employee may perform campaign-related activity at the office, using the association's office equipment, as a campaign volunteer if: (a) this time is limited

[3] To make a contribution, an individual must be a U.S. citizen or green card holder and may not be a federal government contractor. PACs and campaigns may not solicit foreign nationals or accept contributions from them.

to one hour per week or four hours per month; (b) it does not prevent his/her completion of normal association duties; (c) the activity does not increase the association's overhead or operating costs (such as local or toll-free telephone calls); and (d) the association does not condition Internet or computer availability on political activity or support for, or opposition to, any particular candidate or political party.

    - A related exemption permits any employee to perform voluntary Internet campaign-related activity (email, blogging, maintaining a website, etc.) for an unlimited amount of time at the office, using the association's computer equipment, if this activity: (a) does not prevent the completion of work the association expects him or her to perform, (b) does not increase the association's overhead or operating costs and (c) is not performed under coercion.

- If support staff services are required—such as catering or welcoming guests—the corporation must invoice the campaign or an eligible donor and receive full payment of the services' fair market value *before* the event.

- Campaigns' fundraising staff or consultants often will arrange catering, manage RSVPs and follow-up with donors. This is preferable to assigning such tasks to association employees who are ineligible to serve as volunteers.

CALCULATING CAMPAIGN-RELATED EVENT COSTS

When calculating event costs, the test is what the goods or services usually cost in the market from which they ordinarily would have been purchased at the time of the event. Organizing a 10-25 attendee fundraiser generally costs between $300 and $700 for meeting space, catering and support staff time. The following guidelines apply to these costs regardless of who pays:

- *Employee Compensation* – Charge the individual's hourly rate plus 75 percent to cover benefits and overhead. For example, a fundraiser with 10-25 attendees may involve three support staff employees (reception, clean-up and tear-down) at $20 per hour for one hour each, which totals $105 with the 75 percent gross-up included. The association should not allocate any cost to employees' volunteer efforts (see the "PAC- or Individual Contributor-Paid Event" section above).

- *Office Space* – If the association routinely offers use of a meeting room to community or other

outside groups, no value is associated with using it for the fundraiser. If the association regularly charges members or others a fixed fee for use of the space, this fee is the market rate for the fundraiser's use. An association that does not provide meeting space to other entities consistently for free or at a usual and normal rate may value the space by determining the ordinary cost of a similarly-sized meeting room in a nearby hotel or conference facility. Prices in downtown Washington, DC for a 90-minute fundraiser generally range from $100 for a 5-10 seat conference room to $250 for a 30-seat board room.

- *Office Equipment, Supplies and Other Association Assets* – When calculating the value of association assets used in a campaign-related event, the best method is to use the cost the association charges to any other entity, such as a member. The association may not discount this cost when providing assets for use in a campaign-related event. If, however, the association does not ordinarily charge for photocopies, list rentals, etc., it should apply the ordinary prices charged by sellers of equivalent goods or services in the local market. For example, if FedEx Office charges $0.10 per copy or a direct mail vendor charges $2 per name and address, the association should apply the same cost. Certain individual employees' use of office computers and local or toll-free telephone calls involves no reportable cost to the association (see the "PAC- or Individual Contributor-Paid Event" section above).

- *Catering* – We recommend arranging to have the campaign pay the caterer directly when possible. This eliminates the association's need to calculate and disclose the value. If a PAC or individual pays, the catering contract and receipt will constitute sufficient evidence of market value.

DISCLOSURE

1. Federal Election Commission

   - An association has nothing to disclose to the FEC when the campaign, a PAC, or an individual contributor pays for the event directly or reimburses the association's costs in advance.
     - If the PAC pays the fundraiser's costs, it must report them as in-kind contributions, which are subject to its $5,000 per-election contribution

limit,[4] to the candidate in FEC Form 3X reports.

- Individuals need not report their in-kind contributions to the FEC but should provide documentation (*e.g.*, catering contracts, invoices and check copies) to the campaign on a timely basis to help the campaign comply with its disclosure obligations.
- Campaigns, leadership PACs and political party committees must disclose contributions raised by registered federal lobbyists (and their employers) or their PACs under certain conditions. We recommend involving Venable Political Law counsel when structuring a fundraiser to avoid unnecessary disclosure and compliance problems.

2. Lobbying Disclosure Act

- *Semiannual LD-203 Contribution Reports* – An association registered under the LDA must disclose in its organizational LD-203 report payments made by its PAC for candidate fundraisers if such payments exceed $200 in the reporting period and are not reimbursed by the campaign or an individual contributor.
  - Such payments are considered in-kind contributions and count towards the PAC's contribution limits.
  - Employee time is not reportable for LDA purposes if the employees serve in a volunteer capacity.
  - Individual federal lobbyists must make this disclosure on their personal LD-203 reports if they pay the event's costs from personal funds.
  - When completing the LD-203 form to disclose an in-kind "FECA" contribution, we recommend identifying the campaign as the "payee" instead of the association, caterer, or other recipient of the donor's funds and the candidate as the "honoree."
  - The costs of association-paid restricted class events (meeting space, catering, employee time to facilitate the event, etc.) should not be disclosed on Form LD-203 contribution reports because the FEC excludes permissible

[4] The contribution limit for a multicandidate PAC to a federal candidate is $5,000 per election. Less established PACs, like individual donors, are limited to $2,500 per election.

corporate/association campaign event activity from the definition of "contribution."

- *Quarterly LD-2 Lobbying Reports* – Fundraisers are not "lobby-free zones." The cost of employees' time spent engaging in LDA-defined "lobbying activities" at the fundraiser on behalf of the association must be included in the association's expenditure estimate on Line 13. Individual lobbyists' lobbying issues and contacts likewise are reportable on Lines 16 and 17.

For more information, please contact the authors of this White Paper.

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Forming an Association Political Action Committee

VENABLE LLP ON POLITICAL LAW

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white paper

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Forming an Association Political Action Committee

VENABLE LLP ON POLITICAL LAW

Tax-exempt trade and professional organizations (such as associations) often establish political action committees ("PAC") to support the election of officials who are aligned with their organization's policy goals. PACs are necessary because the Federal Election Campaign Act ("FECA") prohibits nonprofit associations and other corporations from using treasury funds to support federal candidates or political parties. Additionally, the FECA places strict limits on how nonprofit associations may use facilities and resources in connection with political activities.[1]

A PAC is somewhat different from other entities associated with a corporation. It is a separate entity, but still managed by, and part of, the corporation.

Associations and their PACs may solicit voluntary contributions of up to $5,000 per year from the association's "restricted class." This includes the association's salaried employees with decision-making authority and their families. If the association's members are individuals, it may also solicit its members and their families. If the members are corporations, the rules are a bit different. With a corporate member's written permission, a trade association or its PAC may solicit the corporate member's restricted class, too (which includes its salaried employees with decision-making authority, shareholders and both groups' families).

The PAC can make contributions to candidates for federal office of up to $5,000 per election with the funds it raises.

This white paper provides an overview of PACs and summarizes the process by which an association can establish an affiliated PAC.

[1] 2 U.S.C. § 441b.

I. CREATING THE PAC

A. Defining the PAC

To establish a PAC, an association must first determine the PAC's name, select a treasurer, establish the PAC's governance, and decide how to administer the PAC. The formal corporate name of an association must be included in the PAC's name for use in reports to the Federal Election Commission ("FEC") and disclaimer notices, however, the FECA allows a PAC to use a "pacronym" on PAC letterhead and checks. The PAC's name need not include the words "political action committee," although most do. Other, more elaborate names include "good government fund" or "employee action fund."

B. Treasurer, Assistant and Custodian of Records

The FECA requires every PAC to have a treasurer. It does not require any other officers. The treasurer of the PAC is responsible for complying with the FECA and is subject to civil penalties for violations, such as failure to file reports in a timely manner or more serious violations, like accepting corporate contributions. The treasurer should therefore be a "hands-on" person who will actively participate in the PAC's administration.

In addition to a treasurer, the FECA recognizes an assistant treasurer and a custodian of records. It is advisable to have an assistant treasurer for two reasons. First, a PAC cannot accept or make contributions without a treasurer and the FEC allows an assistant treasurer to fill this role in the absence of a treasurer. In addition, the assistant treasurer provides backup to the treasurer in the event he or she is unable to file a report on time. The custodian of records (who may also be the treasurer or assistant treasurer) is the individual responsible for maintaining all of the documents mandated by the FECA, such as payroll deduction authorization forms, copies of checks and other similar items.

Some PACs also have a "PAC Administrator" who assists the treasurer with preparing FEC disclosure reports and other routine tasks. For example, if a PAC has an oversight body, the administrator will often be responsible for planning and scheduling meetings and keeping minutes of those meetings. Often, the PAC Administrator serves as the assistant treasurer and/or custodian of records.

In addition to a treasurer, some PACs decide to have a Chairman or Director to oversee fundraising. This may be a high-profile person who will be a successful fundraiser, but who does not have the time to serve as the treasurer, who is not an employee of the association or who does not have a compliance background.

C. Governing Body

Generally, associations create oversight bodies comprised of representatives from different stakeholders among the association's management and membership to involve a wider audience in their PAC's efforts. Others elect to provide the chief executive officer of the PAC with broad authority to make PAC

contributions with little input from management, subject only to supervision of his or her overall job performance.

A PAC oversight body may be vested with varying levels of authority. Some associations require the PAC oversight body to approve an annual giving plan, which may be quite broad, permitting the treasurer to contribute to recipients who are on the annual plan's preapproved list without further consideration. This permits the treasurer or government affairs staff to react quickly to new opportunities while still acting within limits set by the oversight body. Others require approval by the committee for every contribution before it is made. The level of discretion you confer to a PAC oversight body is a matter of internal organizational dynamics, not campaign finance law. In many instances, the PAC oversight body has general supervision responsibility, an active role in setting contribution goals, and authorizes contributions to candidates.

D. Bylaws

Although not required by law, most associations elect to adopt bylaws for their PACs' operations. The bylaws serve two basic purposes. First, the bylaws set forth the governance structure as discussed above. Second, the bylaws help to maintain consistency in the PAC's operations over time.

Establishing bylaws presents multiple governance options to consider. The FEC regulates how an association manages PAC operations in only a few limited areas, so prudential decisions based on the organization's policies and procedures, general good governance practices, and the association's culture and structure generally dictate PAC governance.

E. Establishing the PAC

Once an association has finalized the details of its structure, it is ready to establish the PAC. This involves several simple tasks. First, an association's Board should approve the creation of the PAC (this is both a corporate "formality" and also often a banking requirement). As part of this step, the association should select PAC officers and adopt bylaws for the PAC's administration. Second, an association must open a checking account for the PAC. Third, an association must file FEC Form 1 with the Federal Election Commission within 10 days of formally creating the PAC. At that point, the PAC may begin its fundraising efforts.

F. Depository Account

The account into which an association deposits PAC contributions may not contain any corporate funds. Therefore, an association must open a separate account. The account must be opened with a check from a contributor (not with a check from the association's account). We recommend choosing a non-interest bearing account to eliminate the need to file tax returns, which cost more to prepare than all but the largest PACs earn in interest. Opening the PAC account at the same bank that serves the association generally is advisable.

G. FEC Form 1

To register the PAC with the Federal Election Commission, the PAC must file FEC Form 1. This form must be submitted within 10 days of when an association's Board approves formation of the PAC.

II. OPERATING THE PAC

A. PAC Administrative Costs

Under the FECA, an association is known as the "connected organization." As the PAC's connected organization, an association may pay all administrative and solicitation costs for the PAC. For example, an association may pay all legal fees for the PAC, postage for mailings, staff time to compose solicitations, credit card processing fees, and virtually any other cost associated with the PAC. We recommend instructing the PAC's bank to deduct all fees from an account of the association—instead of debiting the PAC account—to preserve PAC funds and to streamline FEC reporting.

Additionally, association staff may provide services to the PAC as part of their normal duties, such as determining fundraising goals and deciding which campaigns to support. This enables the PAC to dedicate all contributions to the PAC's election efforts without deducting administrative costs.

B. Compliance and Reporting

The PAC will be required to deposit checks in a timely manner and file reports with the FEC on a regular basis. Depending on the size of the PAC, the reports must be filed electronically, which generally is easier to do regardless of the PAC's size.

There are several options for operating the PAC. First, an association may use its staff to deposit checks, keep the books and file FEC reports. Staff should be well trained on how to prepare and submit reports and have access to counsel for questions that arise with reporting. Alternatively, a number of PAC administration companies provide PACs with the opportunity to outsource compliance duties.

C. PAC Solicitations

The PAC must be funded with voluntary contributions of up to $5,000 per year.[2] Although any U.S. citizen (or permanent resident alien) is permitted to contribute to the PAC, the PAC may solicit only its "restricted class" for contributions. The restricted class is comprised of (1) management-level employees of an association and their families;[3] (2) certain individual association members;[4]

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[2] Contributions may be made by check, credit card, payroll deduction, or direct debit. If an association uses payroll deduction or direct-debit, it may be a one-time deduction or it may be periodic. The association must obtain signed consent from each donor who chooses to contribute by payroll deduction. The association must also retain copies of all contribution checks made out to the PAC.

[3] Management-level employees include salaried employees with "policymaking, managerial, professional or supervisory responsibilities." 11 C.F.R. § 114.1(c). This specifically includes the "individuals who run the corporation's business such as officers, other executives, and plant, division, and section managers" and also "individuals following the recognized professions, such as lawyers and engineers." *Id.* § 114.1(c)(1). The FECA specifically excludes "[p]rofessionals who are represented by a labor organization" and "[s]alaried foremen and other salaried lower level supervisors having direct supervision over hourly employees" from the restricted class of executives that may be solicited. It also excludes consultants who are not association employees. *Id.* § 114.1(c)(2).

and (3) management-level employees and shareholders of member companies that have authorized a trade association to solicit these individuals.

An association must obtain prior written approval from its member companies before soliciting its members' restricted classes.[5] A corporation may provide this permission to only one trade association per year. The authorization must identify the year for which it is effective, although a single solicitation may contain a number of years (e.g., by including a separate signature line for each year).[6] Only the corporation that is a member of an association may be solicited – subsidiary and parent companies may be solicited only if they also are members of the association and have provided their own written consent.

D. PAC Expenditures

Initially, the PAC will be allowed to make contributions of up to $2,500 per election to federal candidates (e.g., $2,500 to each of a candidate's primary, runoff, general and special elections per election cycle). Once it has been in existence for six months, received contributions from 51 people, and given to five candidates, it may make contributions to candidates of up to $5,000 per election.[7] Thus, the PAC could give up to $10,000 to a single candidate in the typical election cycle: $5,000 for the primary and $5,000 for the general.

The PAC may also make contributions to political parties and other PACs. For example, it is allowed to give $5,000 a year to any other PAC. However, an association may not solicit other PACs for contributions. Failing to observe this restriction is a common problem for associations' PACs regarding member PACs' contributions. Because corporate and association PACs cannot solicit one another, a PAC that wishes to contribute to another must make the contribution without prompting.

The PAC may also make contributions to state candidates, but will be subject to state contribution limits and reporting requirements if it does so. Before an association decides to give to state candidates, it should carefully investigate the requirements that will apply.

Although the FECA imposes a number of restrictions on PACs, careful planning can minimize their hurdles and risks. Venable can assist with each step in the process and help to navigate all FEC regulations.

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[4] Certain criteria determine whether an association qualifies as a "membership organization," and whether its members qualify as "members" for purposes of solicitation and contributions. 11 C.F.R. §§ 100.134(e) and (f).

[5] 11 C.F.R § 114.8(c).

[6] *Id.* § 114.8(d)(4).

[7] Once the PAC meets the threshold of six months, 51 contributors and five contributions, it is known as a "qualified multi-candidate committee" and must file an FEC Form 1M with the FEC within 10 days of meeting the last of these three criteria to notify the FEC that it is qualified. A multi-candidate PAC must also identify this status on its check stock.

Please contact the authors with any questions regarding the information in this White Paper.

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VENABLE LLP

playing politics: a menu of options for associations

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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 it 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 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 of 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 of 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 then $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 say 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.

For more information on nonprofit organizations and political activities, contact the authors at rmjacobs@venable.com or 202-344-8215 and amegaris@venable.com or 212-370-6210.

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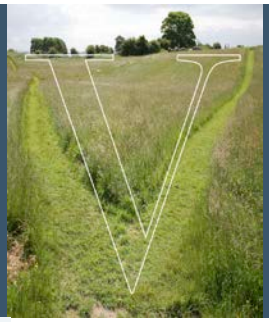

grassroots lobbying: a legal primer

ISSUES TO CONSIDER

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Grassroots lobbying—encouraging members of the public to contact their elected or appointed officials to ask them to take a certain action—can be a very powerful tool in a successful lobbying campaign. This primer provides an overview of the legal issues you should consider when designing and implementing a grassroots campaign.

EFFICACY & ETHICS OF GRASSROOTS TECHNIQUES

Officials have called into question some grassroots campaigns that they believe resulted in communications from the public that were not "authentic" expressions of grassroots support for a position. For example, Members of Congress expressed skepticism about the communications they received on healthcare reform and climate change legislation. Some of the concern focused on the methods used to generate the communications and some focused on whether the communications were even real. Skeptics often refer to such efforts as "astroturf" lobbying to imply that they are not driven by legitimate grassroots activists, but rather by corporate interests. Even the appearance of an illegitimate grassroots campaign can harm your organization's goodwill and reputation among policymakers, ultimately undermining the ability to effectively advocate on behalf of the issues your organization cares about. There are several steps your organization can take to ensure that its grassroots campaign is both successful and authentic.

Will officials view the communications from constituents as legitimately driven?

Whether a grassroots communication is "legitimate," "authentic" or "real" depends on the answers to three questions:

1. Was the communication specifically authorized by the person identified as the author of the communication?
2. Was the communication based on accurate facts and analysis?
3. What role did the organization play in facilitating the communication?

As described below, your organization must implement policies and procedures to prevent outright fraud and deception in its grassroots campaign. Less straightforward, however, is determining what role your organization will play in the campaign. Will it simply fund efforts to reach out and inform the public, or will it actively coordinate campaign activities? The more an organization—be it a corporation, trade association, or nonprofit charity—controls and/or directs the grassroots activities, the less genuine the resulting communication may appear in the eyes of the official and public. A grassroots campaign, although organized by an association, company, or coalition, should allow for genuine interaction with members of the public. Your organization must carefully consider how to strike the appropriate balance between facilitating grassroots participation and overreaching.

Are the communications real?

Your grassroots campaign must be monitored and verified to prevent fraudulent or deceptive grassroots outreach. Fraudulent or deceptive grassroots outreach include sending communications from a person or group that does not exist, signing or otherwise authenticating a communication on behalf of a person or group who did not specifically authorize such communication, or knowingly submitting false information to an official. While this may seem obvious, the risk of fraud in grassroots campaigns—in particular larger campaigns involving professional vendors—is real. In the past few years, Members of Congress have received fraudulent letters on climate change and the Commodities Futures Trading Commission has received fake comments. In both cases, the letters were submitted by a contractor, bearing the names of real people and organizations, who had not signed the letters.

Your organization should take the following steps to prevent fraud:

- Implement policies and procedures for employees and vendors.
- Establish verification procedures.
- Require all communications generated through the campaign to be sent directly from the individual writing the letter or email to the official (in other words, do not send the communications on the individual's behalf).
- Require your vendors and employees to report any potential occurrences of fraud immediately.
- Spot check petitions, letters, etc. to confirm validity of the individuals' names.

- Do not compensate vendors or employees on a per-communication basis.
- Do not provide incentives to individuals to contact public officials.

Is your message fair and truthful?

It is important that your grassroots campaign is based on truthful and not misleading facts, analysis, and information. The information you disseminate to educate and inform the public will be scrutinized by public officials and your opponents alike. Using unbiased, peer-reviewed sources minimizes the probability that the accuracy of your information will be called into question. Similarly, you should be completely transparent with the public regarding the identity of the source of the data or study you rely on. In particular, if your organization provided financial support for the development of the data or study, it should be disclosed.

Finally, you should avoid using scare tactics to motivate the public to get involved. This is particularly important if your supporters come from vulnerable segments of the population. As demonstrated during the health reform debate, any short-term benefits could be outweighed by long-term harm to your organization's credibility. Scare tactics would include inflated claims about the impact of legislation or a regulatory decision that are not supported by legitimate facts or studies, or an appeal to concerns that are not addressed or impacted at all by the legislation or regulation.

DISCLOSURE OF GRASSROOTS ACTIVITY

Federal and state lobbying disclosure

Various federal and state laws require organizations that fund or participate in grassroots lobbying to disclose their grassroots lobbying activities.

On the federal side, disclosure may be required under the Federal Lobbying Disclosure Act ("LDA"). The LDA requires an organization to report lobbying activities if one or more of its employees spends more than 20% of his time on lobbying activities. Grassroots lobbying, however, does not fall within the LDA's definition of lobbying, and thus does not have to be reported on your organization's LDA report *unless* you elect to track and disclose lobbying expenses using the Tax Code's definition of lobbying. Under the LDA, an organization can track and disclose lobbying expenses on their LDA reports

using either the LDA's definition of lobbying or the Tax Code's. As discussed below, the Tax Code's definition of lobbying includes grassroots lobbying.

A majority of state lobbying disclosure laws define lobbying to include grassroots or "indirect" lobbying. In some states, you must register and report grassroots lobbying conducted in that state, regardless of whether you are registered for conducting direct lobbying. In other states, grassroots must be reported only if you already are registered for direct lobbying. Grassroots lobbying aimed at influencing federal policy does not have to be reported to the states.

Tax issues

The Tax Code imposes different reporting rules depending on whether your organization is a trade association, 501(c)(3) charity, or business. It also imposes limits on the amount of lobbying a 501(c)(3) may do.

Trade Associations: Trade associations may participate in lobbying, but are required to tell their members what percentage of dues are nondeductible. Similarly, businesses may engage in lobbying, but are prohibited from deducting lobbying expenses as a business expense. Under Section 162(e) of the Tax Code, which applies to associations and corporations, lobbying is broadly defined as "[a]ny attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referenda." Under this definition, trade associations and for-profit corporations must track grassroots lobbying expenses as lobbying expenses.

501(c)(3): Organizations exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code are subject to stringent restrictions on the amount of lobbying activity in which they may engage. Section 501(c)(3) permits lobbying (which includes direct lobbying and grassroots lobbying) as long as it is not a "substantial part" of an organization's total activities.

There are two options for 501(c)(3)s when it comes to determining what constitutes lobbying. They can use the general "facts and circumstances" test to determine whether their lobbying activities are a substantial part or they may make the 501(h) election. This election provides more clarity on what is and is not lobbying, and provides a specific dollar limit on how much lobbying an organization may conduct.

Under Section 501(h) of the Tax Code, grassroots lobbying is defined as any communication to the public that:

- refers to specific legislation;
- reflects a point of view on the legislation; and
- encourages the recipients to *take action* with respect to the specific legislation by contacting their legislators.

The costs of researching, drafting, planning, reviewing, and mailing—including any amount paid in compensation for an employee's work on any of these activities—are considered lobbying expenses. For more information on the 501(h) election, please click **here**.

CAMPAIGN FINANCE CONSIDERATIONS

In the recent U.S. Supreme Court case, *Citizens United v. FEC*, the Court struck down a federal ban on "independent expenditures" and "electioneering communications" made by nonprofit and for-profit corporations. Independent expenditures are payments made to fund communications, such as television ads, that expressly advocate the election or defeat of a specific candidate for federal office. Electioneering communications are expenditures by corporations made within 60 days of a general election or 30 days of a primary election if the expenditure is used to fund a communication that is made by broadcast, cable, or satellite, and refers to a clearly identified candidate for federal office.

Under *Citizens United*, your organization has new tools for conducting grassroots outreach. For example, you can now pay for print, internet, radio, and television advertising; place endorsements on your organization's website; and place advertisements on your organization's website. Such activities, however, may trigger disclosure requirements under campaign finance law. Moreover, the *Citizens United* decision did not impact direct giving ("contributions") to candidates, PACs or political parties, which is still prohibited. As such, expenditures may not be coordinated with a candidate, which would change the expenditure into an in-kind contribution. The Federal Election Commission ("FEC") has issued a complicated framework for determining what is considered to be "coordinating," which is outside the scope of this primer.

While the Supreme Court overturned a number of restrictions, it did uphold certain disclosure obligations that apply to electioneering communications and independent expenditures.

Therefore, to the extent your organization spends over $10,000 during any calendar year to fund communications through broadcast, radio, satellite, or cable that refer to clearly identified candidates within 30 days of a primary election or 60 days of a general election, it will have to file disclosures with the FEC revealing (1) the corporation making the communication, (2) the amount spent, (3) and certain contributors.

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 then $200 if the contribution "was made for the purpose of furthering the reported independent expenditure." 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).

ADVERTISING LAW ISSUES

Television & Radio

All television and radio advertisements must identify the sponsor of the advertisement and include certain specified disclaimers.

If the communication involves candidates, then there are additional FEC rules that apply. Communications not authorized by the candidate, as would almost certainly be the case for an independent expenditure or electioneering communication not coordinated with the candidate, must (1) provide a name and address (or web address) for the entity making the communication, (2) state that the communication is not authorized by any candidate, and (3) include the following audio statement: "___ is responsible for the content of this advertisement." If transmitted through television, this statement must also appear on screen in accordance with specifications set forth in FEC regulations.

Email

The use of email to communicate with constituents regarding public policy unlikely triggers CAN-SPAM issues. However, to the extent that the emails contain any message advertising or promoting a commercial product or service, the email may be subject to the statute's requirements.

Messages that fall under the "commercial" category are subject to three key requirements: (i) provision of an electronic opt-out mechanism that recipients can use to refuse future e-mail solicitations (opt-out requests must be honored within 10 days of receipt), (ii) prominent disclosure of the fact that the e-mail contains an "advertisement" or "solicitation" (unless the recipient has provided his or her "affirmative consent" to receive commercial e-mails from the chamber), and (iii) inclusion of the sender's valid physical postal address.

Phone

Under the Federal Communications Commission's rules implementing the Telephone Consumer Protection Act, "robocalls" to cellular telephones are prohibited without the prior express consent of the called party. Several courts have found that this prohibition extends to text messages. Such calls to residential telephone numbers are permissible to the extent they do not contain any commercial content.

CONCLUSION

A successful grassroots campaign can be an important part of a lobbying effort, particularly if it is done well. Should you have additional questions about grassroots campaigns, please contact **Ron Jacobs** at 202.344.8215 or rmjacobs@venable.com, **Larry Norton** at 202.344.4541 or lhnorton@Venable.com, **Alexandra Megaris** at 212.370.6210 or amegaris@venable.com, or **George Constantine** at 202.344.4790 or geconstantine@Venable.com.

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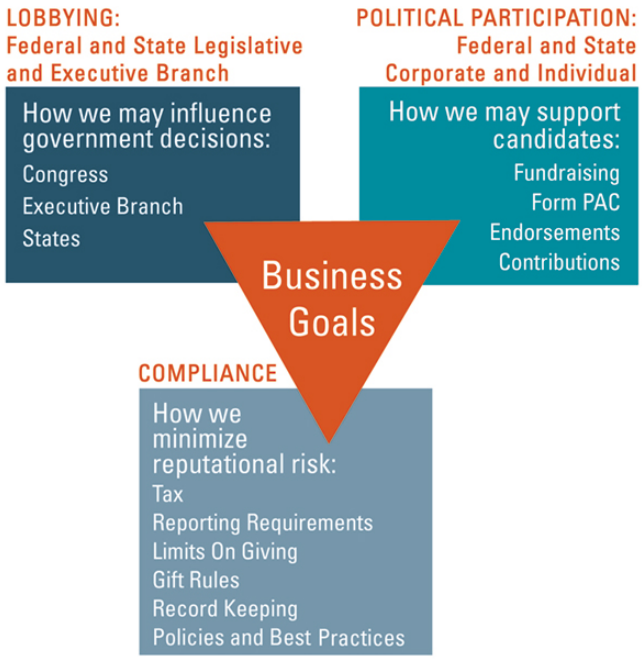
POLITICAL LAW

successfully navigating your interaction with the government

You want to be involved in the political process—or maybe you already are—by lobbying, making political contributions, issuing endorsements, generating grass-roots communications or influencing the nomination process for yourself or someone else. Whether it's planning a charitable event with a member of Congress; starting a Political Action Committee (PAC), advocacy group or coalition; taking a staffer to lunch; or making a campaign contribution; there are many rules that restrict what you can do, how you can do it and how you can pay for it.

We help clients navigate this minefield to accomplish their goals at the federal, state and local levels. Whether you are designing your own lobbying and electoral strategy or having Venable help, we work with you to make sure the options you choose won't land you in trouble—or even in the press.



We can help with your political law needs at every step of the process. Whether you are an old hand, a newcomer who needs to understand what the rules are or someone who is facing an investigation, we can help.

We make participating in the government as simple as possible. We strive to give clients comfort in knowing they are complying with election and lobbying laws, while doing an effective job of making their views and needs known to legislators and agency decision makers.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com