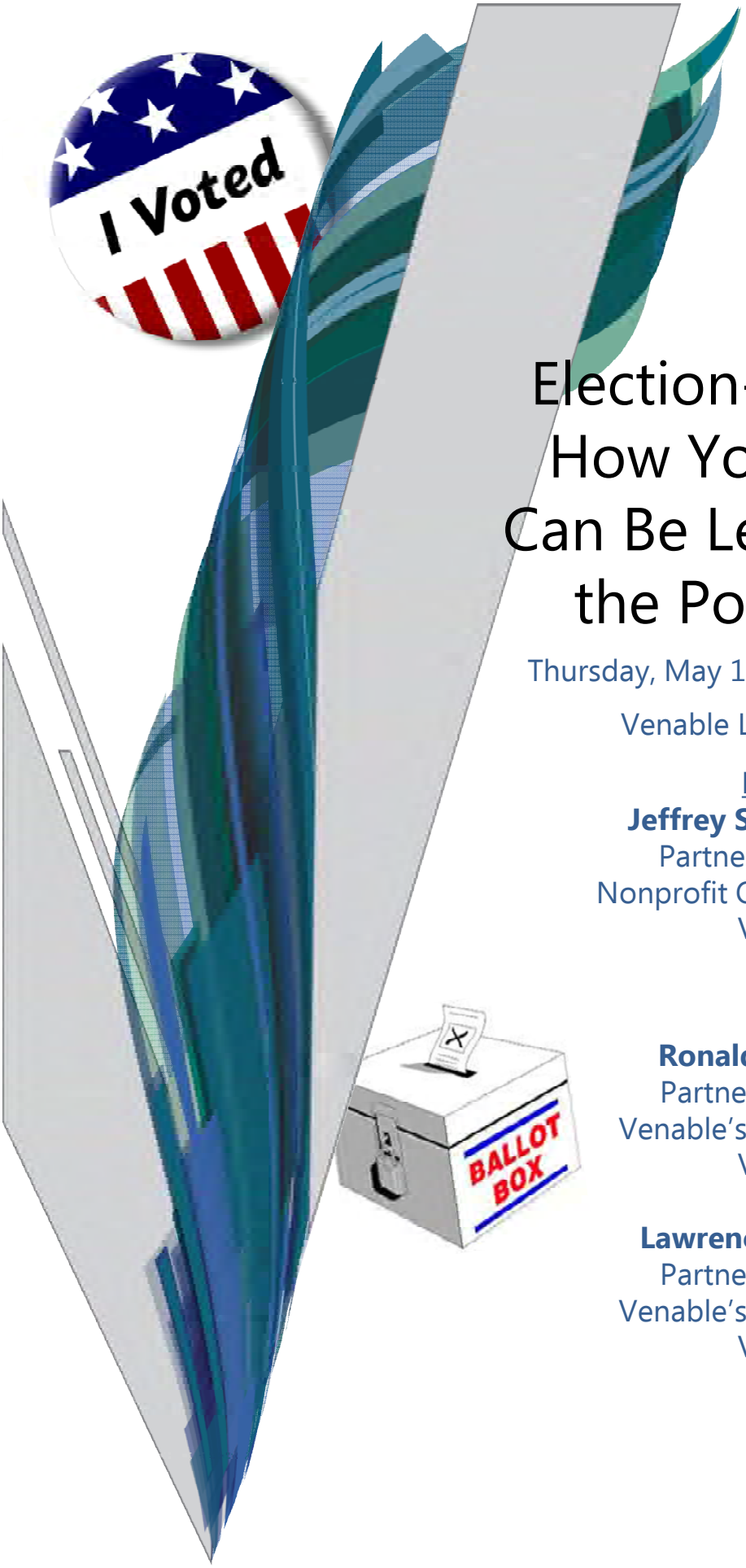


VENABLE® LLP

# Election-Year Activity: How Your Nonprofit Can Be Legally Active in the Political World

Thursday, May 19, 2016, 12:30 – 2:00 pm ET

Venable LLP, Washington, DC

**Moderator**

**Jeffrey S. Tenenbaum, Esq.**
Partner and Chair of the
Nonprofit Organizations Practice,
Venable LLP

**Speakers**

**Ronald M. Jacobs, Esq.**
Partner and Co-Chair of
Venable's Political Law Group,
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**Lawrence H. Norton, Esq.**
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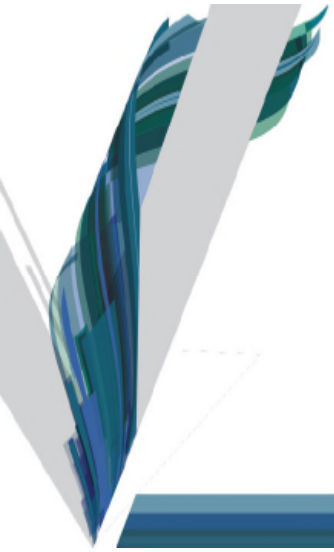
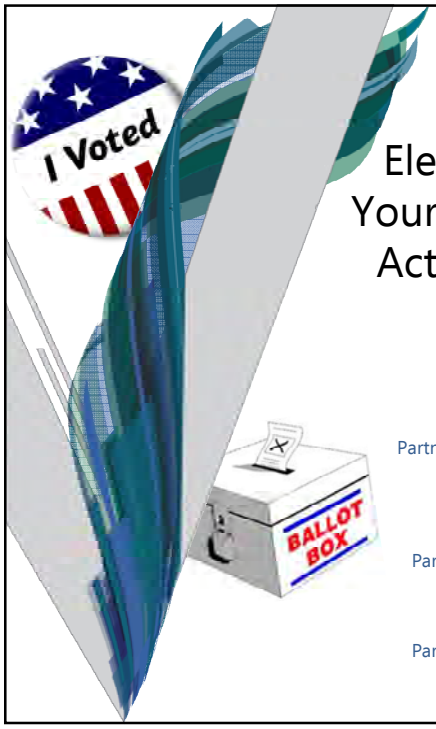


# Presentation

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Register Now

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- **September 20, 2016:** How to Protect Nonprofits' Federally Funded Programs with Global Anti-Corruption Controls



VENABLE 3

## Agenda

- Overview of Issues
- 501(c)(3) Activity
- 501(c)(4) and (6) Activity
- Political Action Committees
- Super PACs



VENABLE 4

# Overview of Issues

## The Legal Framework



# Basic Campaign Contribution Rules

**Corporations**

- Federal: may not give
- State: laws vary

**Foreign Nationals**

- Prohibited at federal, state, and local level
- May not control political activities

**Contractors**

- Federal: banned (but applies mostly to individuals)
- State: restricted by many state and local laws

**Reimbursements**

- Prohibited at federal, state, and local level
- Earmarking through other entities often restricted

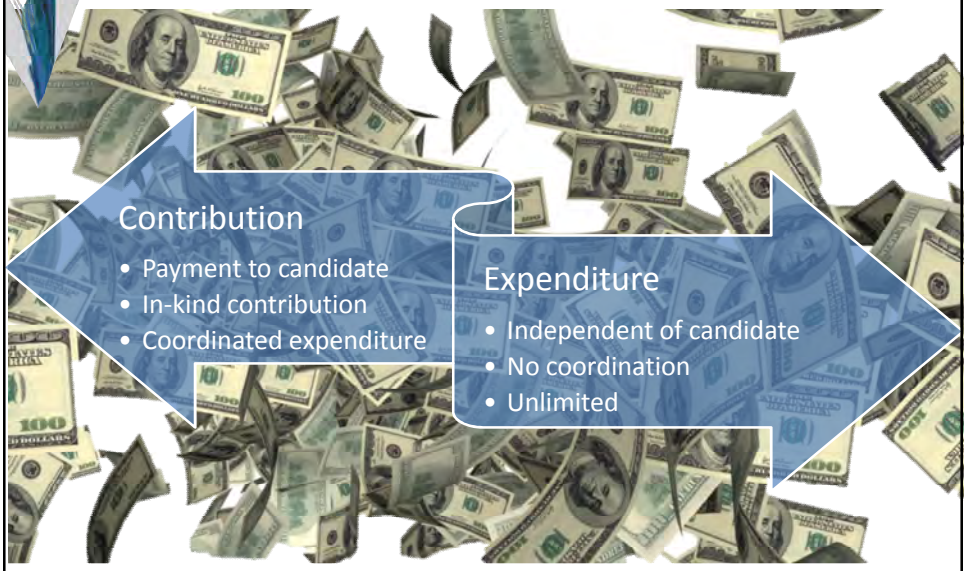
# Contribution Limits

| | To a Candidate | To a National Party Committee | To State and Local Parties |
|---|---|---|---|
| Individual May Give | $2,700 per election | $33,400 per year* | $10,000 per year |
| Multicandidate PAC May Give | $5,000 per election | $15,000 per year* | $5,000 per year |
| Non-Multicandidate PAC May Give | $2,700 per election | $33,400 per year* | $10,000 per year |

*Additional amounts may be given to convention, building, and legal funds.




# Contributions & Expenditures



# Nonprofit Organizations

| 501(c)(3): Public Charity | 501(c)(6): Trade Association<br>501(c)(4): Social Welfare |
|---|---|
| No "campaign intervention"<br>• No endorsements<br>• No contributions<br>• No communications to support candidates | Campaign intervention limited<br>• May not be primary purpose<br>• May contribute to candidates (if allowed under state law)<br>• May form a PAC<br>• May make communications to support candidates |
| Lobbying may not be substantial part of activities | Unlimited lobbying |
| Unlimited issue advocacy if not lobbying | Unlimited issue advocacy |




# Defining the Terms

**Lobbying**

- Influencing legislation

**Campaign Intervention**

- Supporting/Opposing Candidates

# Visits by Candidates in Official/Other Capacity

**Reason** — Other than candidacy
- Sitting official
- Expert
- Community leader

**Organization** — No mention of candidacy
- Communications refer to official position
- Invitations/introductions do not refer to candidacy

**Guest/Speaker** — No mention of candidacy
- Speaks in other official role
- Does not talk about campaign

**Event** — No campaign activity
- Non-partisan atmosphere
- No fundraising





# 501(c)(3)s

Plenty to Do

## Basic 501(c)(3) Rule

- No campaign intervention
  - No contributions to candidates
  - No use of corporate resources to support candidates
  - No events/activities designed to benefit a candidate
  - No endorsements




## Lots that can be done

- Interact with officeholders who are candidates
- Host debates and forums
- Communicate on issues
- Send scorecards and questionnaires

## Debates

- All candidates invited
  - May use objective criteria to create reasonable size
  - May host for one party for primary elections
- Questions must be neutral
  - Variety of topics
  - May not favor one candidate
- No endorsements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## Forums

- Invite all candidates
- Equal time
- Equally good time
- Neutral questions
- Variety of questions


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## Forums & Debate Issues

- Provide equal opportunity to respond/present views
- Don't use agree/disagree questions
- Don't comment on questions
- Don't imply approval or disapproval
- No fundraising
- Maintain neutral atmosphere




## Candidate Questionnaires

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

## Scorecards

- Regular activity
  - Not timed with election
  - End of each legislative session
- Track a variety of issues
- Include all legislators
  - Don't include candidates who are not incumbents
  - Don't mention which incumbents are candidates
- Don't editorialize




## Voter Registration

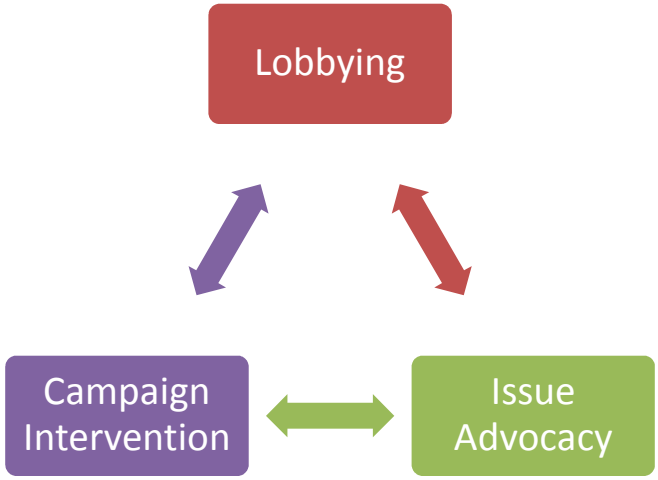
- Must be nonpartisan
- No mention of candidates, or include all candidates
- May not target voters of a particular party

## Interacting with Candidates

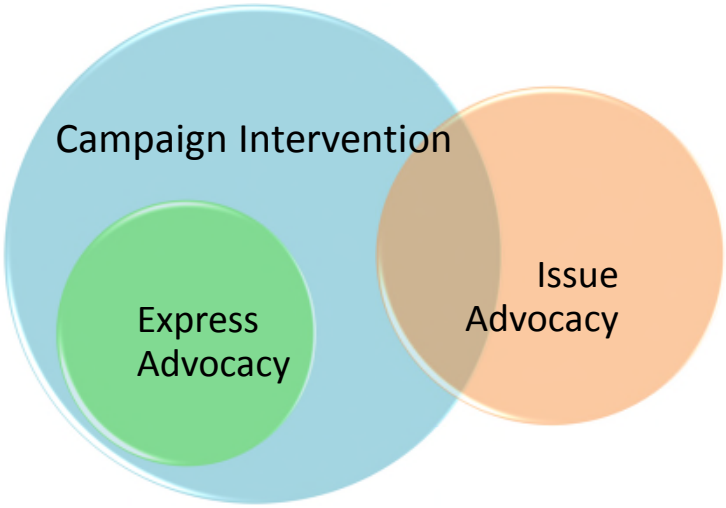
- May urge candidates to support policies ("lobbying" candidates)
- May not ask candidates to take a pledge
- Should provide material to all candidates
- May provide policy papers and other materials
- Should not create content at the request of candidates, unless it will be shared by all




## Communications



## Scope of Intervention





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## Executive Activities

- Do not lose First Amendment rights
- Must act in personal capacity
- Must not use 501(c)(3) resources
- Position okay for identification purposes
- Include disclaimers
- May serve in advisory capacity in personal role


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# Examples of Disclaimers

DAILY NEWS
OPINIONS & OP-EDS

...And so, that is why you should vote for Joe Blow for Mayor on Tuesday.

*Sally Smith is the executive director of Neighborhood 501(c)(3). The views presented here are hers and not those of the organization.*

CITIZENS FOR JOE BLOW

Dear Bob:
* * *
Join us on Tuesday to support Joe Blow.

Sincerely,

Ben Baloney
President
Save the Shrews

Kent Conrad
Chairman
Slay the Shrews

*Titles provided for identification purposes only.*



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# Fundraising by Executives

- No use of 501(c)(3) resources
  - No facilities/space
  - No mailing lists/email lists
  - May use personal contacts
- Home fundraisers
  - FEC: $1,000 per person per candidate for food and beverage, above that in-kind contribution
  - States: varies
  - Candidate may pay


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

Allowed to Intervene



VENABLE 27

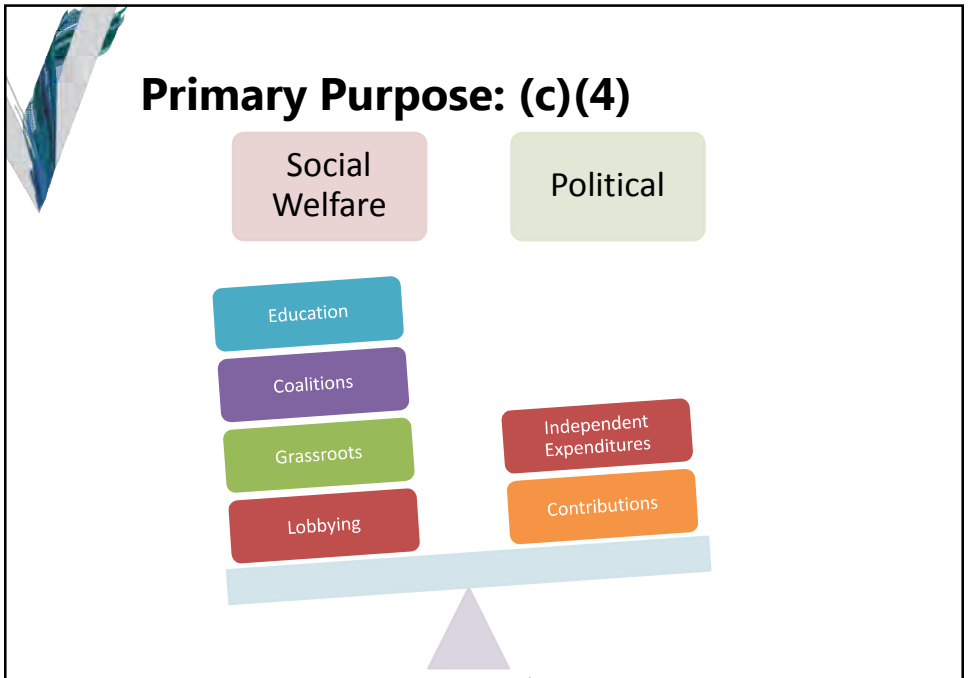
## Some Limits

| Federal Law | State Law | Tax Law |
| --- | --- | --- |
| • No contributions, only expenditures | • May have limits | • May not be primary purpose |



VENABLE 28

# Primary Purpose: (c)(4)




Safe Harbor: 60%/40%



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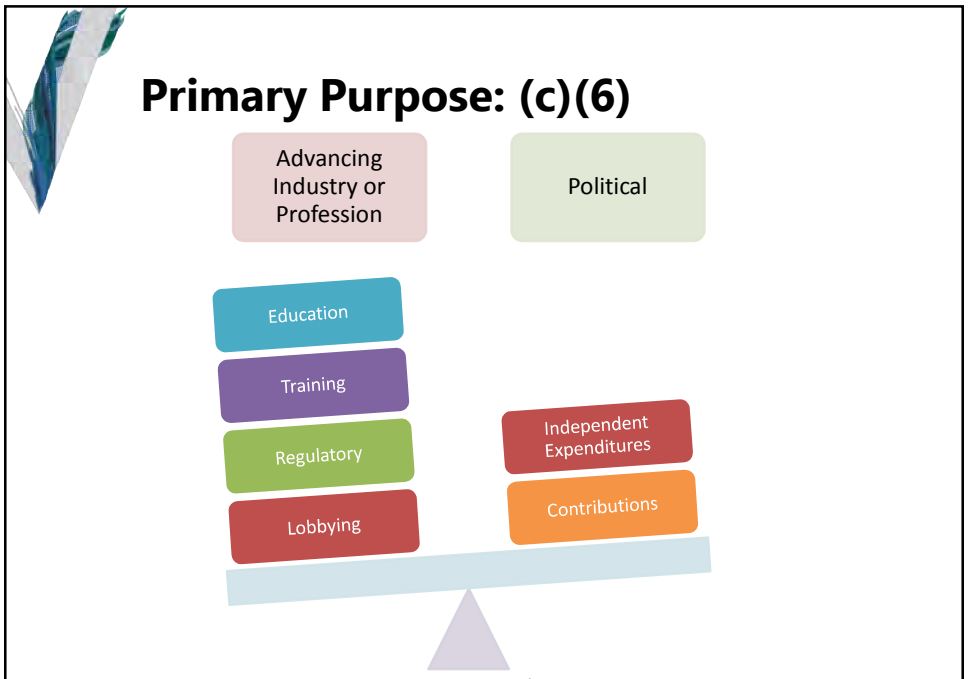
# Primary Purpose: (c)(6)




Safe Harbor: 60%/40%



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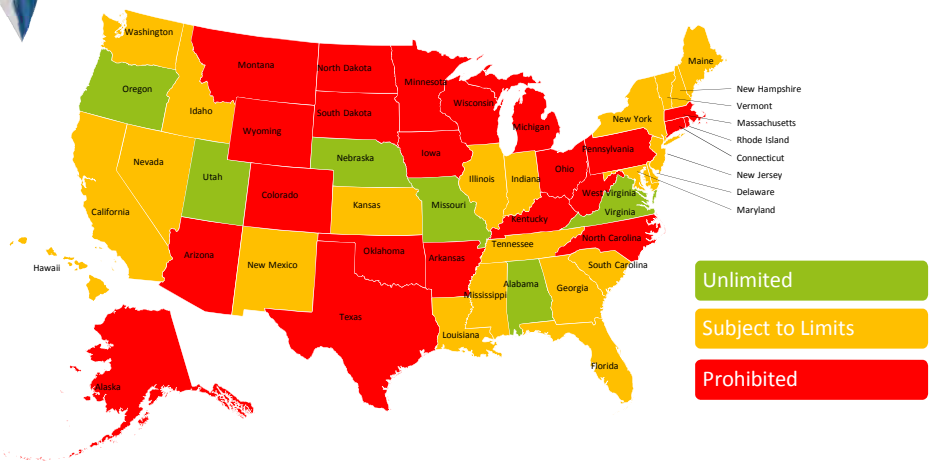
# What Is Campaign Intervention?


- Facts and circumstances
  - Timing, content, background
- IRS tried to define it in rulemaking
- Intervention includes:
  - Express advocacy/independent expenditures
  - Campaign contributions
  - Endorsements
  - Supporting a connected PAC



VENABLE 31

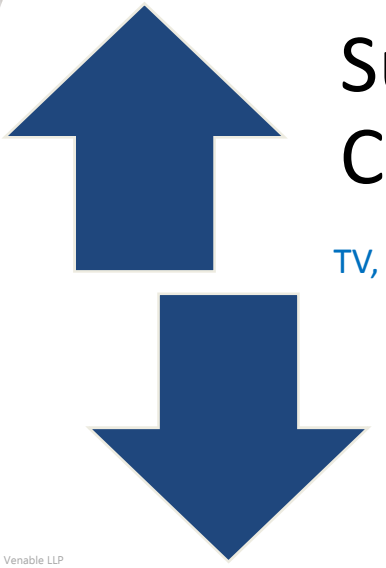
# State Corporate Contributions to Candidates






VENABLE 32

## Making Independent Expenditures



Supporting Candidates

TV, radio, web, email, GOTV

Opposing Candidates





## Must be Independent

## Coordination

Request

Suggestion

Discussion

Common Vendor

Former Employee

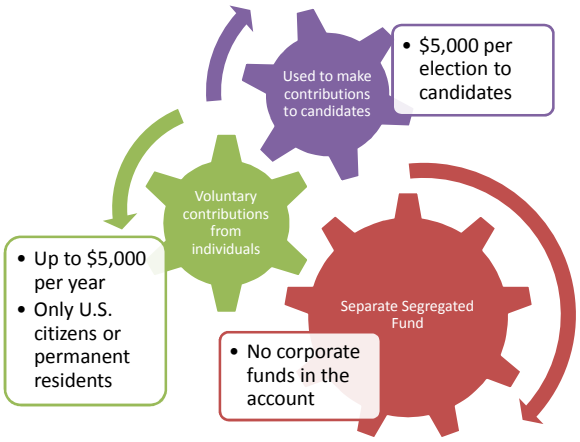




## Political Action Committees

Giving to Candidates

# Political Action Committees







# Dispelling Myths

- PACs don't buy influence
- PACs are highly transparent
- PACs do provide opportunities to interact with lawmakers
- PACs help to elect and retain members who understand and support the PAC's positions

## Connected versus Non-Connected

**Non-Connected**

- No related corporation
- May solicit any U.S. citizen
- All administrative and fundraising costs paid by PAC

**Connected**

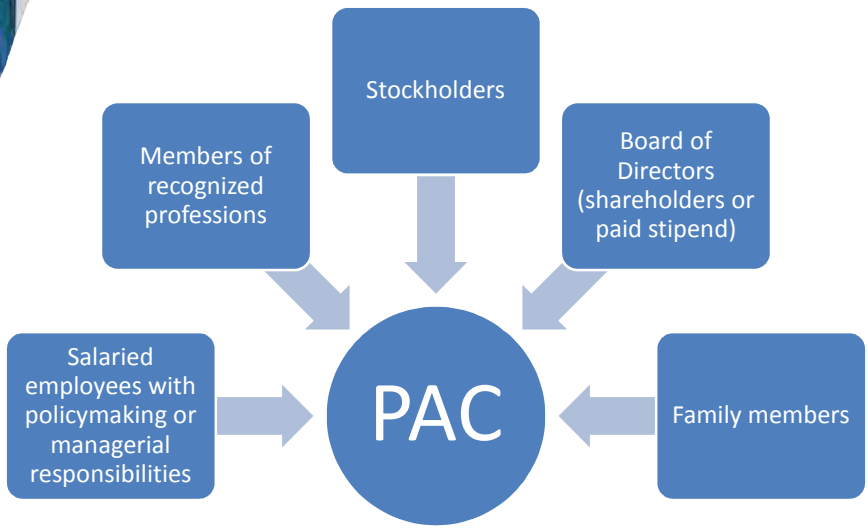
- Related corporation
- May pay for administrative costs
  - Fundraising costs
  - Compliance costs
- May only solicit restricted class
- May accept contributions from any U.S. citizen




## Restricted Class

- The individuals who may be solicited to make contributions to the PAC
- Varies by type of connected organization:
  - For-profit corporation
  - Membership organization
  - Trade or professional association

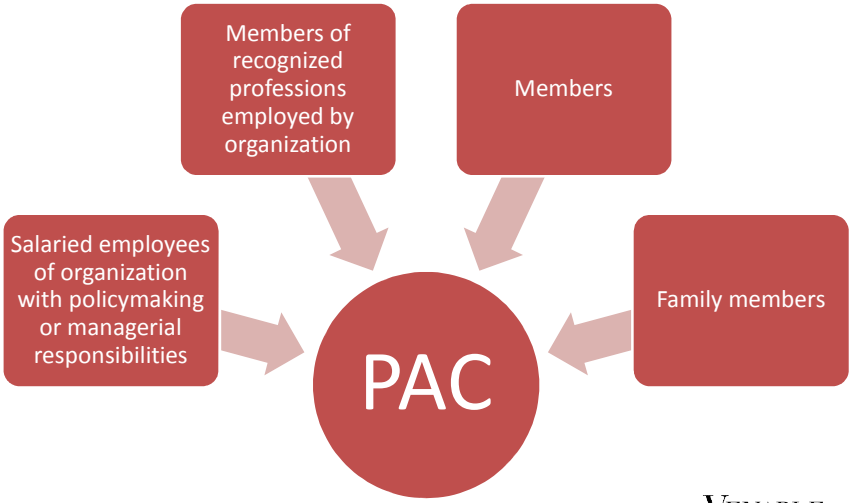
## Corporation Restricted Class





VENABLE 41

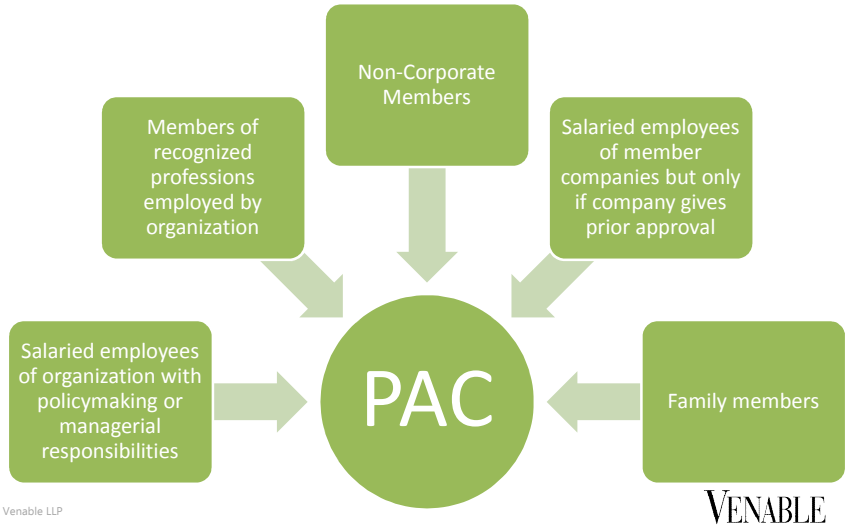
## Individual Membership Organization Restricted Class





VENABLE 42

## Corporate Membership Organization Restricted Class





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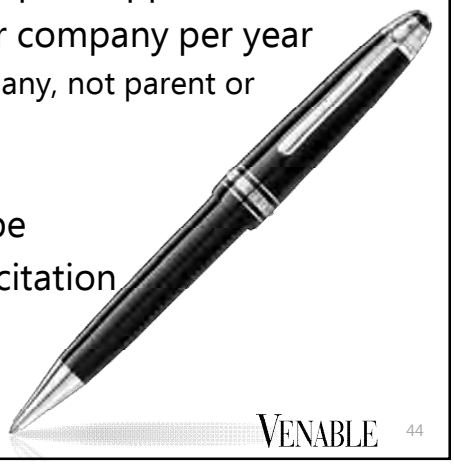
## Trade Association Solicitation

- May solicit executives of member companies only if the member gives prior approval
- Only one association per company per year
  - Applies to member company, not parent or subsidiary
- Must be in writing
- Company may limit scope
- May include sample solicitation

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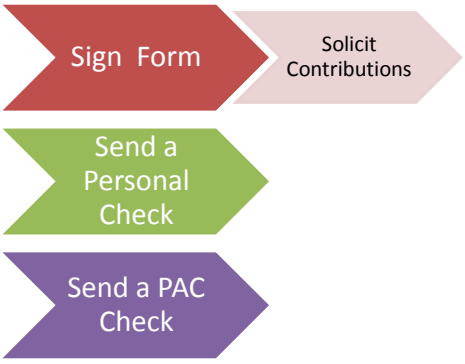
## Prior Approval in Practice

- Limits ability to communicate with corporate members
- All requests must be focused on prior approval
- May communicate with association leadership




## Responses to Prior Approval



## Dealing with Prior Approval

- Individual Members
  - Create individual members
  - Create related organization with individual members
- Requirements
  - Affirmation of membership
  - One of the following:
    - Pay annual membership dues

      OR
    - Role in governance

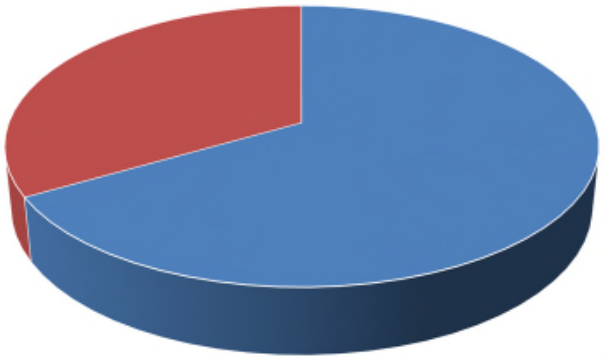



## PAC Incentives

- Receptions/dinners with senior leadership
- Trinkets
- Prizes
- Charitable match

## One-Third Rule

- Value of prize < 1/3 value of contribution
- PAC must pay excess
- Universe of contributions is important







## Examples

- Raffle:
  - $1,200 in contributions
  - Prize worth no more than $400
- Gifts:
  - $10 pen
  - Contribution must be more than $30

## Prizes and Awards

- Subject to 1/3 Rule, paid for by the connected organization
- If trade association, member companies using corporate funds, may donate prizes
  - 1/3 Rule requires reimbursement to association if value exceeds 1/3 of contribution




## Charitable Match

- No benefit to contributor
  - No token gifts from charity
  - No tax deduction to contributor
  - No tax deduction to organization
- Charity
  - May be limited by company to specific list
    - Including related foundations
  - May be open to any 501(c)(3) organization
  - System to verify charities
- Level
  - One-for-one approved by FEC in Advisory Opinions
  - Two-for-one dismissed in enforcement action (4-2 vote)

## FEC Reports

- Regular reports filed with FEC
- Donors disclosed who give more than $200:
  - Name
  - Address (may be company address)
  - Occupation
  - Employer
- All contributions given by the PAC
- Available online





## Reporting Schedule

Election Year

- Quarterly
- Plus pre-primary reports where needed

**OR**

- Monthly

Off-Years

- Semi-annual

**OR**

- Monthly

## Maintaining Records

- Must retain records for three years
- Record of all receipts
- Record of all disbursements
- Signed prior approvals
- Signed payroll deduction authorization
- Contribution forms
- Bank statements




## Contribution Limits

- New PAC: $2,700 per election to candidate
- Multi-Candidate PAC: $5,000 per election to candidate
  - In existence for six months
  - Made contributions to five candidates
  - Received contributions from 50 different contributors

## PAC Events for Candidates

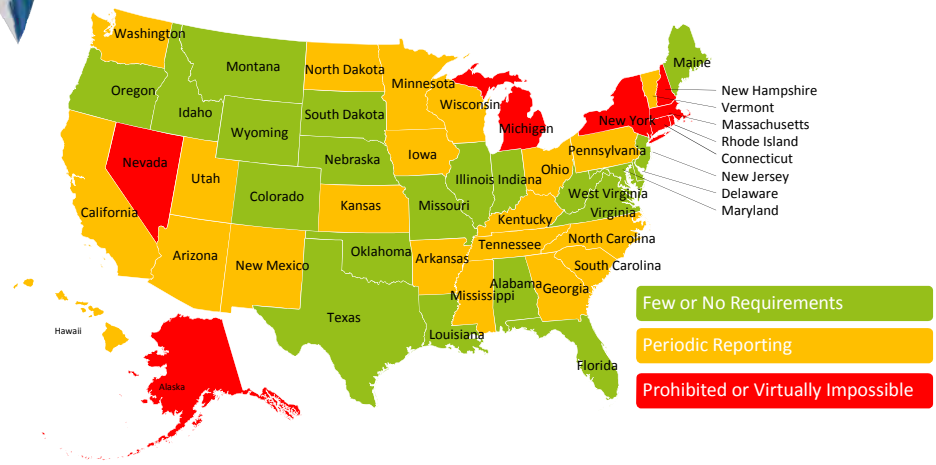
- PAC pays for food and beverage
- PAC pays for room rental
- PAC invites attendees
  - Restricted class
  - Others not with company
- PAC pays for corporate staff time
- All is treated as in-kind contribution to candidate, subject to $5,000 limit per election




## Restricted Class Event

- Limited to restricted class
  - Those employees outside of the restricted class necessary for event
- Special guests (e.g., speakers)
- May urge attendees to vote for candidate
- May solicit contributions for candidate
- May not collect contributions—must be given directly to candidate
- May provide food and beverage
- No charge for room
- May limit to one candidate and not include opponent

# Federal PAC Contributions to State Candidates



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# Tax on Political Activity

- 527(f) Tax
- Lesser of net investment income or political expenditures
- 35% tax
- Unless paid for from segregated fund
  - Fund must be registered with state, FEC, or IRS
  - Donors must be disclosed




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# Questions?

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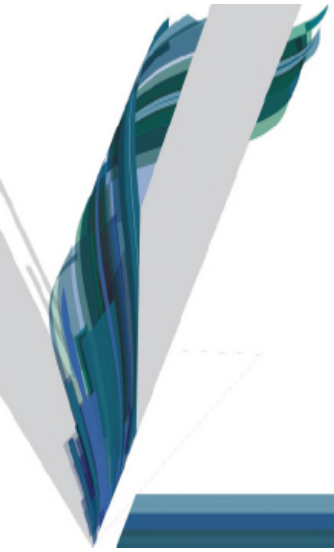

# Speaker Biographies

VENABLE® LLP

our people

# Jeffrey S. Tenenbaum

Partner

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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 a highly 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, 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. He also has served as an expert witness in several court cases on nonprofit legal issues.

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 only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last four years (2012-15). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, 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 2012-16 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" 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
Financial Services

## GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

## BAR ADMISSIONS

District of Columbia

## EDUCATION

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

## REPRESENTATIVE CLIENTS

AARP
Air Conditioning Contractors of America
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Cancer Society
American College of Cardiology
American College of Radiology
American Council of Education
American Friends of Yahad in Unum

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

## MEMBERSHIPS

American Society of Association Executives

New York Society of Association Executives

American Institute of Architects
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
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Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
CFA Institute
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Democratic Attorneys General Association
Design-Build Institute of America
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of International Education
International Association of Fire Chiefs
International Rescue Committee
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation

National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
New Venture Fund
NTCA - The Rural Broadband Association
Nuclear Energy Institute
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Telecommunications Industry Association
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

## HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-16

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-16

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

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*, now in its second edition, published by the American Society of Association Executives. He also 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. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *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 topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.

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# Ronald M. Jacobs

Partner

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Ronald Jacobs serves as co-chair of Venable's Political Law Group and as hiring partner in the firm's Washington, DC office. He 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. Mr. Jacobs 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, he 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, charities, campaigns, Super PACs, 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.

## SIGNIFICANT MATTERS

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

- Serving as general counsel to a successful 2014 candidate for the United States Senate.
- Representing a Super PAC that supported a candidate in the 2012 presidential primary, creating one of the first Super PACs active in a Los Angeles mayor's race and one of the first Super PACs active in a local Maryland election, as well as representing Super PACs active in Congressional elections.
- Creating a 501(c)(4) that engaged in issue advocacy and candidate activities connection with the 2012 presidential general election.
- Obtaining approval from Senate Ethics Committee for major nationally-televised charitable event held during the Holiday Season in Washington.
- Developing pay-to-play compliance policy and procedures for a large hedge fund that actively solicits state contributions and for a hospitality company that serves state and local governments.
- Successfully defending a large, nationally-known trade association during a Congressional investigation into allegations of fraudulent grassroots lobbying activity.

## 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

## BLOG

Political Law Briefing

## 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

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## MEMBERSHIPS

American Bar Association

Federalist Society, Free Speech and Election Law practice group

- Assisting a large social welfare organization with multiple Congressional investigations and several class action lawsuits.
- Serving as outside *pro bono* counsel to Warrior Canine Connection, a charity that assists soldiers suffering from traumatic brain injury and post-traumatic stress disorder to train service dogs for physically wounded soldiers.

## HONORS

Recognized in *Chambers USA*, Government: Political Law, National, 2011 - 2015

Recognized in *Legal 500*, Not-For-Profit, 2014 - 2015

Included in "Rising Stars" edition of *Washington DC Super Lawyers*, 2013 - 2015

Recognized in *National Law Journal* as one of the Rising Stars 40 under 40, 2015

## 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. Mr. Jacobs is also a top 5 faculty member of Lawline, a leading provider of online and live continuing education courses for attorneys across the United States.

## PUBLICATIONS

Mr. Jacobs has authored or co-authored a number or political law and nonprofit issues and serves as co-editor of the firm's Political Law Briefing blog.

- March 2016, Election-Year Tips for Nonprofits: Employee Participation in the Political Process
- March 22, 2016, Ballot Initiative Disclosure, *Political Law Briefing Blog*
- March 9, 2016, Election Year Tips for Employers, Labor & Employment News Alert
- March 4, 2016, Don't Forget: Recent FEC Case Is a Reminder That Federal Law Prohibits, *Political Law Briefing Blog*
- February 25, 2016, Hosting Fundraisers: One Company's Example of How Not to Do It, *Political Law Briefing Blog*
- February 9, 2016, Pay-to-Play Pitfalls to Avoid in 2016, Fund Forum
- February 2016, SEC looks at CCO outsourcing, pay-to-play pitfalls to avoid during election season, and more in the February 2016 edition of Fund Forum, Fund Forum
- January/February 2016, Steering Clear of Federal Telemarketing Fines, *Staffing Success*
- November 5, 2015, Election-Year Advocacy for Nonprofits: Getting Your Legal Playbook Ready
- October 15, 2015, Recent Developments Following *North Carolina Dental* Decision
- June 2015, Major Campaign Finance, Lobbying, and Gift Law Changes in MD and VA in this issue of Political Law Briefing, Political Law Alert
- June 4, 2015, Advertising Law Enters the Political Process in this edition of Advertising Law News & Analysis, Advertising Alert
- May 20, 2015, The U.S. Supreme Court's Decision in *North Carolina Dental Board*: What State Attorneys General Need to Know about Antitrust Immunity for State Licensing Boards
- May 14, 2015, Maryland Changes Rules Again on Political Contribution Disclosure by Government Contractors; Lobbyist-Employers Also Affected, Political Law Alert
- May 6, 2015, Federal Appeals Court Affirms Mandatory Filing of Unredacted Donor List by Charities Registered for Solicitations in California
- April 14, 2015, Interacting with State and Local Governments: What Your Nonprofit Needs to Know about Lobbing and Gift Rules

## 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.

- June 8, 2016, "Election-Year Political Activity: A Primer for Financial Services Providers," a Venable-hosted webinar
- May 19, 2016, Election-Year Activity: How Your Nonprofit Can Be Legally Active in the Political World
- January 2016, "Ramping Up for the 2016 Elections: What You Need to Know About Political Law" at the Virginia Continuing Legal Education Online Seminar
- November 5, 2015, "Election-Year Advocacy for Nonprofits: Getting Your Legal Playbook Ready" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- July 16, 2015, "Leading in the Face of Crises - Back out of the Rabbit Hole: Aftershocks and Moving On" at CESSE 2015 Annual Meeting: Leadership in a Connected World
- July 15, 2015, "Down the Rabbit Hole and Back - Leading in the Face of Crises: Presentation of Real Life Case Studies" at CESSE 2015 Annual Meeting: Leadership in a Connected World
- May 19, 2015, "Non Profit Section Meeting - Accounting for and Reporting Nonprofit Lobbying Activity" for the Greater Washington Society of CPAs
- April 14, 2015, Legal Quick Hit: "Interacting with State and Local Governments: What Your Nonprofit Needs to Know about Lobbing and Gift Rules"
- March 26, 2015, Ramping up for the 2016 Cycle: Make Compliance a Priority for Lobbying and Political Activity
- February 25, 2015, "Judicial Fundraising" for the George Washington Political Law Society
- October 20, 2014, "Campaign Finance and Political Activities (Webcast for Live Credit)" for Lawline
- October 20, 2014, "Political Law Compliance Overview (Webcast for Live Credit)" for Lawline
- August 21, 2014, "Creating a Compliance Plan" for Lawline
- August 21, 2014, "Selling to State and Local Governments" for Lawline
- August 21, 2014, "Advanced Political Activities: Independent Expenditures and Super PACs" for Lawline
- July 15, 2014, "Campaign Finance and Political Activities" for Lawline
- July 15, 2014, "State and Federal Lobbying Activities" for Lawline
- July 15, 2014, "Political Law Compliance Overview" for Lawline
- June 10, 2014, Legal Quick Hit: "Developing Your Government Investigations Playbook: What Your Nonprofit Should Be Doing Now to Prepare for the Future" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 20, 2014, Surviving a Governmental Investigation without a Black Eye: Key Legal, Communications and Crisis Response Considerations for Nonprofits
- April 29, 2014, Election-Year Advocacy:? Maintaining Your Nonprofit's Clear Message in Cloudy Legal Seas
- April 9, 2014, "IRS Proposed Rules for Political Activity of 501(c)(4) Organizations," George Washington University Law School
- April 8, 2014, Legal Quick Hit: "Election-Year Activities for Your Nonprofit: Avoiding the Legal Pitfalls and Understanding the Evolving Landscape" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- March 20, 2014, "Political Broadcasting 2014 – Handling the Storm" for the Federal Communications Bar Association
- February 25, 2014, "IRS Rulemaking and Unintended Consequences," American Society of Association Executives (ASAE) Alliance Forum

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# Lawrence H. Norton

Partner — *Washington, DC Office*

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Larry Norton is Chair of Venable's Government Division, which includes more than 150 lawyers and lobbyists in the regulatory, government contracts, legislative, and state and local government practice areas. He also co-chairs the firm's Political Law Group and advises clients regarding federal and state campaign finance and other election laws, gifts to government officials, and lobbying registration and disclosure.

Mr. Norton's clients include large and small corporations and their PACs, nonprofit organizations, trade associations, Super PACs, ballot committees, and politically-active individuals. He assists clients with a wide range of matters including:

- Conducting compliance audits of federal and state lobbying and political programs, and training for government affairs professionals and other key personnel;
- Establishing and operating PACs, Super PACs, 501(c) organizations, and ballot committees;
- Assisting nonprofit organizations with corporate governance and tax matters, contracts, communications programs (traditional and social media), and political activity and lobbying;
- Advising government contractors on "pay-to-play" laws, which restrict political contributions by contractors as well as their affiliated entities and principals;
- Representing clients in government audits, civil and criminal investigations, and matters before the U.S. House and Senate Ethics Committees;
- Pre-clearing political contributions, as well as personal and corporate fundraising; and
- Preparing and filing campaign finance and lobbying reports.

From 2001-2007, Mr. Norton served as General Counsel for the Federal Election Commission, where he directed the agency's enforcement, litigation, and rulemaking programs. 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.

Mr. Norton has been selected for inclusion by *Chambers USA* (Government: Political Law - Nationwide) and has been repeatedly recognized as a top election and ethics lawyer by *Washingtonian Magazine* and *Super Lawyers*.

## AREAS OF PRACTICE

Political Law

Legislative and Government Affairs

Regulatory

## INDUSTRIES

Nonprofit Organizations and Associations

## BLOG

Political Law Briefing

## 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

## HONORS

Recognized in *Legal 500*, Not-for-Profit, 2015

Recognized in *Chambers USA,* Political Law, National, 2012 - 2015

Selected for inclusion in *Washington DC Super Lawyers*, 2013 - 2016

New York

## EDUCATION

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

Listed among the 2011-2012, 2013 and 2015 Top Lawyers: Campaigns and Election Law by *Washingtonian* magazine

## PUBLICATIONS

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

- March 2016, Election-Year Tips for Nonprofits: Employee Participation in the Political Process
- March 9, 2016, Election Year Tips for Employers, Labor & Employment News Alert
- January 13, 2016, The Office of Government Ethics Proposes Changes to the Gift Rules: How the Changes Could Limit Interaction With Government Officials, *Political Law Briefing Blog*
- June 2015, Major Campaign Finance, Lobbying, and Gift Law Changes in MD and VA in this issue of Political Law Briefing, Political Law Alert
- May 14, 2015, Maryland Changes Rules Again on Political Contribution Disclosure by Government Contractors; Lobbyist-Employers Also Affected, Political Law Alert
- May 6, 2015, Federal Appeals Court Affirms Mandatory Filing of Unredacted Donor List by Charities Registered for Solicitations in California
- April 9, 2015, Advertising Law News & Analysis - April 9, 2015, Advertising Alert
- March 26, 2015, Ramping up for the 2016 Cycle: Make Compliance a Priority for Lobbying and Political Activity
- March 3, 2015, Political Law Briefing - March 2015
- March 2015, 2015 Federal Contribution Limits
- January 2015, New Maryland Law Shines Light on Political Contributions by Government Contractors and their Principals, Also Hikes Contribution Limits and Regulates Nonprofits, Political Law Alert

## SPEAKING ENGAGEMENTS

- June 8, 2016, "Election-Year Political Activity: A Primer for Financial Services Providers," a Venable-hosted webinar
- May 19, 2016, Election-Year Activity: How Your Nonprofit Can Be Legally Active in the Political World
- March 26, 2015, Ramping up for the 2016 Cycle: Make Compliance a Priority for Lobbying and Political Activity
- April 29, 2014, Election-Year Advocacy:? Maintaining Your Nonprofit's Clear Message in Cloudy Legal Seas
- March 28, 2014, "Can You Hear Me Now? Why Talking to Regulatory Agencies Matters and How to Do It," Advocacy Leaders Network
- January 16, 2014, Government Affairs Compliance Tune-Up
- 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

# Additional Information

VENABLE LLP

ARTICLES

March 2016

# ELECTION-YEAR TIPS FOR NONPROFITS: EMPLOYEE PARTICIPATION IN THE POLITICAL PROCESS


## AUTHORS

Ronald M. Jacobs
Douglas B. Mishkin
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Jeffrey S. Tenenbaum


## RELATED PRACTICES

Tax-Exempt Organizations
Political Law
Labor and Employment

## RELATED INDUSTRIES

Nonprofit Organizations and Associations


## ARCHIVES

2016 2012 2008
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From now until the polls close on Tuesday, November 8, 2016, politics will be inescapably in the air—and in the workplace. Employees will be talking, sometimes arguing, and sometimes participating in one campaign or another. Prudent nonprofits should take note of what they may be required to do or prohibited from doing about their employees' desire to participate in the electoral process.

**The Workplace Is Not a "Free Country."** Let's start with the basics: the First Amendment does not apply to the private workplace. The Constitution does not prevent private employers from restricting their employees' political speech. Nonprofits generally can restrict employees' speech during work time and on work equipment, especially if the organization has a legitimate, business-related reason to do so.

**Your Tax-Exempt Status.** Nonprofits that are tax-exempt under section 501(c)(3) may not engage in any political campaign activity. The IRS has said that individuals who work for 501(c)(3)s generally maintain their right to engage in political campaign activity, but they have to do so in a way that does not implicate their employer. For example, employees—particularly senior employees—must be careful when endorsing candidates or making other political statements so that it does not appear the organization is endorsing the candidate. The IRS has said that communications should include a clear disclaimer that "titles and affiliations of each individual are provided for identification purposes only," when a nonprofit leader's name and position are included. Employees also should not make endorsements during nonprofit meetings and events.

For 501(c)(4), (5), and (6) organizations, which are allowed to engage in some political campaign activity, what an employee does or says on his or her own time is not likely to threaten your tax-exempt status.

**Your Mission Matters.** Beyond the IRS rules, it is also important to think about your mission. Would having an employee volunteer for a candidate on his or her own time jeopardize the organization's mission? For example, if the organization is involved in policy work on both sides of the aisle, even off-duty campaigning could cause the organization to lose credibility as a neutral party.

What about the opposite situation? What if your organization is politically active? 501(c)(4), (5), and (6) organizations are allowed to engage in political campaign activities, as long as they are not their primary purpose. In some cases, your organization may need to avoid coordinating its activities with candidates. Such organizations might need to restrict some of their employees from working for the candidates they support in order to avoid turning their independent activity into in-kind contributions. In some states, for-profit organizations and nonprofits other than 501(c)(3)s may justify such a restriction based on their business needs or mission; other states would not require any such justification.

**What Do State Laws Say?** A nonprofit's ability to regulate off-duty activity is governed largely by state law, and these laws vary.

Some states have few or no applicable laws. In Virginia, for example, employers may ask employees to refrain from engaging in problematic political activity even in their off-hours.

Conversely, other states, such as Louisiana, expressly prohibit employers from restricting employees' lawful off-duty political activity, even if such activity would conflict with the employer's mission or core values.

Most states, however, fall somewhere in the middle. For example, North Dakota, Colorado, and New York have broad laws permitting employees to engage in lawful off-duty activity, including political activity, but they make a narrow exception if the employer can demonstrate that a prohibition on the activity is related to an essential business interest. Connecticut bars employers from interfering with the exercise of rights guaranteed by the First Amendment, and largely applies rules to private employers

similar to those applied to public employers under federal law. The District of Columbia prohibits discrimination based on party affiliation; while an employer could create a viewpoint-neutral policy prohibiting campaign activity, it would be essential to enforce it across the political spectrum. California's law likely protects both employees and job applicants, and prohibits employers from retaliating against individuals for engaging or participating in partisan and electoral political activity and, more broadly, political policy activity.

Our democracy may aspire to lofty ideals, but prudent management of election-related issues in the workplace frequently boils down to nitty-gritty issues such as the following.

***May I prohibit my employees from using the office copier, telephone, or other resources for political activity?***

If your organization is a 501(c)(3) tax-exempt nonprofit, you ***must*** restrict employees from using your nonprofit's time and resources to support a candidate. For instance, your employees may not make campaign flyers on the office copier or use the organization's member or donor lists to pinpoint potential campaign donors. You must prohibit employees from using their work-issued telephone number, email address, office address, or your organization's name when communicating with candidates or otherwise participating in a political campaign.

501(c)(4), (5), and (6) tax-exempt nonprofits are permitted, but not required, to restrict these activities.

For political activity relating to federal elections and elections in some states, an employee using your nonprofit's resources, such as conference rooms, member or donor lists, or overnight delivery services, must pay the organization (sometimes in advance) for the use of such resources. If this is handled improperly, the organization may be charged with making an illegal, in-kind contribution.

***May I require an employee to remove a political button, t-shirt, or campaign poster?***

You may prohibit your employees from wearing campaign paraphernalia as a part of a neutral dress code. You also may tell employees not to post campaign signs in their cubicle, or tell them to remove a campaign sign from their cubicle.

But be careful: Under the National Labor Relations Act, you may not require an employee to remove political materials if they contain union insignia. Thus, you may not discipline an employee for wearing a "Local XX for [fill in the candidate's name]" button.

***May I require my employees to stop talking about the campaign, candidates, or political issues?***

You may prohibit employees from engaging in conversations about political candidates or about controversial topics in the workplace during work hours. You should be careful that you do not restrict political speech that might relate to labor or working conditions.

If you allow political discussion in the office, be careful that such discussions do not turn into conversations about legally protected characteristics. Discussions about how someone is too old to be president, or how someone should not be president based on gender or religion, could give rise to complaints of harassment or discrimination if an employee feels that a coworker or supervisor is treating him or her unfairly based on the same protected characteristics. This is especially true if a supervisor is having a political discussion with a subordinate.

***May I prohibit employees from making campaign calls during their lunch break?***

You may usually restrict your employees' activities during breaks if those activities are on your premises or use your equipment. For example, you may tell an employee not to make fundraising calls on her work telephone. However, if your employee is on an unpaid break, is using her personal phone, or has left the office for lunch, the answer to this question will depend on your state's laws surrounding restrictions on off-duty political activity.

***May I prohibit employees from posting about controversial or political topics on social media?***

In most states, yes, unless the speech is related to union activity. While some states protect employees' ability to engage in this type of political activity, most do not. Even in the states that do protect this kind of activity, there may be an exception that will allow an employer to discipline or terminate an employee if the employer's interest in restricting the off-duty political speech is strong or if the activity can be linked to the organization (for example, you are more likely to be able to prohibit political speech made on LinkedIn than on an anonymous blog).

***May I require employees to remove political bumper stickers from the cars if they drive their car for official business?***

Generally, yes. However, if your organization is in a state that protects off-duty political activity, you will need to carefully evaluate whether your state's individual law will permit such a restriction.

***May I prohibit employees from running for public office? From holding public office?***

If your state has a law protecting political activity, it is likely that running for office is protected. Absent such a law, an employer arguably could prohibit an employee even from running for political office.

*Holding* office may raise a different employment law question. Under a law protecting political activity, presumably an employer still could prohibit an employee from holding an office that would interfere with job performance. Absent such a law, an employer could prohibit holding office in the same way it could prohibit other outside activities.

Also bear in mind that conflict of interest rules may require an employee running for office to disclose his or her employment relationship on public disclosure reports, including compensation arrangements with the employer.

Once an employee becomes an elected official, other laws may apply. Some states regulate the ability of elected officials to sit on or receive compensation from a corporate board, and some bar businesses associated with an elected official from obtaining government contracts or grants. In addition, some states prohibit the use of public resources and confidential information to benefit a business with which the individual is associated.

***How else might I get in trouble when restricting employees' political activity?***

The short answer is: by enforcing your policies inconsistently or in an un-evenhanded way. Ideally, enforcement should be nonpartisan. In addition, any policies that prohibit political activity will likely be viewed more favorably if the policy captures political activity along with more neutral activities — for example, a dress code that prohibits all t-shirts will also prohibit political t-shirts, and a policy against general solicitation in the workplace can be enforced against employees soliciting for donations for a candidate.

***What Should You Do?***

***A policy.*** Do you have a policy regarding employee political activity? If not, talk to your attorney about whether you should. If you do, review it to ensure compliance with current applicable law.

***Training.*** Once you have a policy in place, train your managers about what is permitted and prohibited and the role you expect them to play in enforcing the policy with the employees they supervise.

VENABLE LLP

## ARTICLES

**February 25, 2016**

# HOSTING FUNDRAISERS: ONE COMPANY'S EXAMPLE OF HOW NOT TO DO IT

***Political Law Briefing Blog***

*This article was originally published in Venable's **Political Law Briefing Blog**.*

As we get closer and closer to the elections, candidates will be working harder and harder to raise money. One tried and true method is the fundraiser: an individual agrees to put together an event where his or her closest friends will make substantial contributions to the candidate, attend a breakfast, lunch, cocktails, or dinner, meet the candidate, and, if they contribute enough, get a picture with the candidate. While this may seem simple and straightforward, companies often get into trouble when they use their corporate resources to help put on fundraisers.

The **largest fine** in FEC history ($3.8 million) came as a result of corporate facilitation back in 2006. Others have **followed**. The FEC just unveiled an enforcement case involving a Nevada architectural firm that paid a substantial fine for using corporate resources to hold a fundraiser. The **settlement** provides a good example of how not to fundraise for federal candidates.

| **What the respondent did** | **How it could have been done** |
|---|---|
|  |  |
| Company president had his secretary organize the event while on the clock for the company.<br><br>*The FEC says it is impossible for **subordinates** to "volunteer" their time, since they are not free to say no. The use of support staff being paid by the company to assist a campaign is defined in the FEC regulations as facilitation.* | 1.) Company president could have planned the event himself or pre-paid the company for the secretary's time and treated that as an in-kind contribution to the campaign.<br><br>**OR**<br><br>2.) Company president could have had the campaign plan and organize the event.<br><br>**OR**<br><br>3.) Company president could have designed the event for just company executives and had the secretary organize it. |


### AUTHORS

Ronald M. Jacobs
Cristina I. Vessels


### RELATED PRACTICES

Political Law


### ARCHIVES

2016 2012 2008
2015 2011 2007
2014 2010 2006
2013 2009

| | |
|---|---|
| Company had its marketing and graphics specialist design the invitation while on the clock and with company resources.<br><br>*Again, having a subordinate perform these services results in corporate facilitation, not a volunteer effort.* | 1.) Company president could have pre-paid the design costs and treated that as an in-kind contribution to the campaign.<br><br>**OR**<br><br>2.) Campaign could have designed a simple invitation.<br><br>**OR**<br><br>3.) If this were a company-executives only event, company could have designed the invitation. |
| Company paid to send out the invitations.<br><br>*Corporate payment of postage or use of its overnight delivery services is a prohibited in-kind corporate contribution to the campaign.* | 1.) Company president could have pre-paid the postage costs and treated that as an in-kind contribution to the campaign or sent the invitations via email so there was no cost.<br><br>**OR**<br><br>2.) Campaign could have mailed out the invitations.<br><br>**OR**<br><br>3.) Company could have invited its executives only and covered any invitations costs. |
| Company sent invitations to suppliers and vendors.<br><br>*FEC treats company lists of vendors and suppliers as something of value, which may not be provided to the campaign without reimbursement.* | 1.) Company president could have sent invitations to his personal contact list (which may have included some of the same people).<br><br>**OR**<br><br>2.) Campaign could have purchased the lists from the company.<br><br>**OR**<br><br>3.) Company could have limited the event to executives only. |
| Company collected contributions and sent them to the campaign.<br><br>*Using company resources to collect contributions is **always** prohibited. Even if conducting events with the* | 1.) Company president could have collected contributions without using any corporate resources, sent them to the campaign, and been disclosed as a bundler. |

| | |
|---|---|
| *"restricted class" only (i.e., executives of the company), company employees may not collect the checks.* | **OR**<br><br>2.) Contributions could have been sent directly to the campaign, which would have maintained the RSVP lists and follow-up with contributors (preferred over method 1).<br><br>**OR**<br><br>3.) Campaign could have collected contributions at the event, if the event were limited to executives only. |
| Company paid for catering for the event and was reimbursed by the campaign.<br><br>*Even though this seems like a reasonable approach that would avoid a corporate contribution, the FEC requires prepayment of any out-of-pocket expenses incurred by the company.* | 1.) The company could have received payment from the campaign ahead of time.<br><br>**OR**<br><br>2.) The campaign could have paid for the catering directly without any involvement of the company.<br><br>**OR**<br><br>3.) The company could have paid for the food if the event were limited to executives.<br><br>**OR**<br><br>4.) A company executive could have paid for the catering and treated it as an in-kind contribution to the campaign.<br><br>**OR**<br><br>5.) A company executive could have held the event at his or her **home** and paid for up to **$1,000 in expenses** without it being considered a contribution ($2,000 if the spouse were involved). |
| *Note:* Options 1 and 2 in each box above generally could be used interchangeably. Option 3 would need to be used throughout. Options 4 and 5 in the last box could be used with Options 1 and 2 throughout. | |

As you can see, there were several permissible options for conducting this event. Some would have resulted in an event that was very similar to the event actually held; others would have been a little different, but still very successful. In addition to the facilitation charges, there were also issues with the company reimbursing contributions, the company coercing contributions (the head of the company allegedly said: "contribute or you won't have any work this year"), and contributions by government contractors.

Interestingly, the campaign (of a long-time Senator) was actively involved in the preparations for the

event, which goes to show you that you cannot rely on the campaign for advice regarding the company's compliance obligations.

And how did all of this come to the FEC's attention? As with most types of corporate political activity, there were lots of eyes on what the company was doing. In this case, the company fired an employee (for reasons unrelated to the fundraiser), and he filed a **complaint** with the FEC. Companies can avoid a similar fate by understanding the rules of the road for hosting political fundraisers and planning accordingly.

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memorandum

MAY 2016


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# Setting up and Operating a Federal Super PAC


Lawrence H. Norton, Ronald M. Jacobs, & Janice M. Ryan


This memorandum summarizes the rules of the road for setting up and operating federal Super PACs, which are groups formed primarily to make "independent expenditures" in connection with federal elections, and which register and file reports with the Federal Election Commission (FEC). An "independent expenditure" is an expenditure for a communication expressly advocating the success or defeat of a clearly identified candidate for federal office. Unlike traditional federal PACs, a Super PAC may accept unlimited contributions from corporations and unions, and unlimited amounts from individual contributors, as long as they are U.S. citizens or green card holders.

A Super PAC may not be used, however, to make contributions to federal candidates, political party committees, or to PACs that contribute to candidates and party committees. A Super PAC's activities must also not be coordinated with a candidate, a candidate's authorized committee, a political party committee, or their respective agents.

Many states allow a federal Super PAC to make expenditures in connection with non-federal elections, although some impose registration and/or reporting requirements. Some states require a separate in-state Super PAC to be created. A handful of states have continued to fight the use of Super PACs, but courts have almost uniformly struck down those laws.

Super PACs can do virtually anything to independently support or oppose candidates. Often they air advertisements on radio and television, but they may also create websites, use social media, and can even develop a ground game to identify voters and get out the vote.

## STEPS To SETTING UP A SUPER PAC

**Select a name.** The Super PAC's name must appear in public filings and in most public communications in the form of a "paid for by" statement. At a minimum, some initial screening should be done to determine the likelihood of trademark challenges to the PAC's name, logo, and slogans.

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**Determine governance structure.** While not required, we recommend that Super PACs incorporate for liability purposes. Donors also often like to see the PAC run by a board with fiduciary obligations responsible for determining how the money will be spent, rather than a hired political consultant who may have a strong incentive to spend money in a way that is beneficial to the consultant. As an incorporated entity, the Super PAC will need articles of incorporation, bylaws, and organizing resolutions. The Super PAC will also need to designate a registered agent to accept service of process.

**Open a bank account.** The Super PAC must open a bank account in its own name, through which all receipts and disbursements should be made. To open the account, the Super PAC will need an Employer Identification Number (EIN) from the Internal Revenue Service.

**Select a treasurer.** The Super PAC must appoint a treasurer who is legally responsible for safeguarding PAC funds and ensuring that the PAC files timely and accurate reports. A PAC may not receive or disburse funds if there is a treasurer vacancy. The FEC therefore encourages PACs to appoint an assistant treasurer who may act in the treasurer's absence.

**Prepare and file initial registration with the FEC**. The Super PAC must register with the FEC by filing a Statement of Organization (FEC Form 1). The FEC Form 1 must be filed within 10 days of receiving contributions or making expenditures in connection with a federal election. The registration form requires the PAC to identify its name, address, committee type, custodian of records, treasurer and any assistant treasurer, and the name and address of the PAC's bank. The FEC Form 1 must also be accompanied by a brief letter specifying the PAC's intention to act as an independent expenditure-only committee.

## FUNDRAISING

A federal Super PAC may accept contributions in unlimited sums from individuals (U.S. citizens or green card holders) and other groups or business entities, including corporations and unions. However, federal political committees, including Super PACs, are prohibited from accepting contributions from foreign nationals and federal government contractors.

## COORDINATION

Super PACs may not make expenditures at the request or suggestion of a candidate, campaign, or political party, or use non-public information obtained from a candidate, campaign, or political party in connection with media strategy, development, or production. Likewise, a Super PAC may not republish campaign materials prepared by a candidate, campaign committee, or political party, except for a brief quote to illustrate a candidate's position or certain other limited purposes. The coordination ban also applies to interactions with agents of the candidate and campaign finance entity of a candidate, such as common vendors and employees (present and former).

Coordination may cause the Super PAC's disbursement to be considered an illegal, in-kind contribution. Such activity can lead to

intrusive investigations, significant penalties, and even criminal prosecution. To minimize these risks, every Super PAC should adopt and implement a coordination policy, provide training regarding the policy to its employees and vendors, and exercise care in its interactions with candidates, campaigns, and political parties.

## ADVERTISING DISCLAIMERS

Public communications by Super PACs must include "paid for by" disclaimers in compliance with FEC rules. The specific disclaimer requirements vary considerably, depending on the communication medium. Any automated phone calls must also comply with sponsorship identification and other restrictions promulgated by the Federal Communications Commission, and may also be subject to state law requirements.

## REPORTING

Super PACs are subject to the same reporting obligations as traditional federal PACs. During an election year, the Super PAC must file reports with the FEC disclosing all receipts and disbursements on either a monthly or quarterly schedule. Quarterly filers must also file pre-primary reports 12 days before every primary in which the PAC is active. Super PACs must also file 24- or 48-hour reports disclosing certain expenditures made just before an election. Given the short turnaround time for these reports, it is important to have good accounting systems in place to make certain that the reports are accurate and filed on time.

Federally registered Super PACs are automatically tax-exempt under Section 527 of the Internal Revenue Code, and generally have no filing obligations with the Internal Revenue Service. However, a Super PAC must file Form 1120-POL with the IRS and pay any associated tax for any year in which the organization has investment or similar taxable income over $100.



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# Setting up and Operating a Maryland Super PAC

Lawrence H. Norton, Ronald M. Jacobs, & Janice M. Ryan

This memorandum summarizes the rules of the road for Maryland Super PACs, which are groups formed primarily to make "independent expenditures" or "electioneering communications" in state or local elections in Maryland. An "independent expenditure" is an expenditure for a communication expressly advocating the success or defeat of a clearly identified candidate. An "electioneering communication" is a communication that merely refers to a clearly identified candidate, is made within 60 days of an election in which the identified candidate is on the ballot, and can be received by a certain number of individuals.

Unlike traditional Maryland PACs, a Super PAC may accept unlimited contributions from corporations and unions, and unlimited sums from individual contributors, as long as they are U.S. citizens or green card holders. However, a Super PAC's activities must not be coordinated with a candidate or candidate's agent, or a political committee established by a candidate. Super PACs can do virtually anything to support or oppose candidates. Often they air advertisements on radio and television, but they may also create websites, may use social media, and can even develop a ground game to identify voters and get out the vote.

## STEPS TO SETTING UP A SUPER PAC

**Select a name.** The Super PAC's name must appear in public filings and in most public communications in the form of an "authority line" statement. At a minimum, some initial screening should be done to determine the likelihood of trademark challenges to the PAC's name, logo, and slogans.

**Determine governance structure.** While not required, we recommend that Super PACs incorporate for liability purposes. Donors also often like to see the PAC run by a board with fiduciary obligations responsible for determining how the money will be spent, rather than a hired political consultant who may have a strong incentive to spend money in a way that is beneficial to the consultant. As an incorporated entity, the Super PAC will need articles of incorporation, bylaws, and organizing resolutions. The Super PAC will also need to designate a registered agent to accept service of process.

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**Select a chairman and treasurer.** A Maryland political committee must have two officers – a chairman and a treasurer – each of whom is a registered voter of the state. The officers are jointly and severally responsible for filing all campaign finance reports and for all other PAC activity. A PAC may not receive or disburse funds if there is a vacancy in either of these offices.

**Prepare and file initial registration with the Maryland State Board of Elections**. The Super PAC must register with the Maryland State Board of Elections before engaging in any activity and before opening a bank account. The registration form requires the PAC to identify its name; appoint responsible officers; file a statement of purpose; state whether the PAC will exclusively make independent expenditures, electioneering communications, or both; and identify the elections in which the PAC will participate.

**Prepare and file Form 8871 with IRS.** The Super PAC must notify the Internal Revenue Service that it is claiming tax-exempt status as a political organization by electronically filing IRS Form 8871, "Political Organization Notice of Section 527 Status." The notice must be filed within 24 hours of the date on which the organization is established. Form 8871 calls for the organization's name, address, and purpose; the names and addresses of its officers, custodian of records, and members of its board of directors; the name and address of and relationship to any related entities; and whether it is claiming an exemption from filing the IRS Form 8872, periodic reports of revenues and expenditures, or filing the IRS Form 990 annual information return. To file the 8871 (and to open a bank account), the Super PAC will also need to apply for an Employer Identification Number (EIN) from the IRS.

**Open a bank account.** The Super PAC must open a bank account in its own name, through which all receipts and disbursements should be made.

## FUNDRAISING

A Maryland Super PAC may accept contributions in unlimited sums from individuals (U.S. citizens or green card holders) and other groups or business entities as long as the contributing entity does not derive the majority of its operating funds from state funding. In addition, an applicant or holder of a video lottery operation license or any person who owns an interest in the operation of a video lottery facility in Maryland may not contribute to a PAC organized in support of a candidate for state or local office in Maryland.

## COORDINATION

Independent expenditures or electioneering communications may not be made at the request of, or in coordination with, a candidate or a campaign finance entity of a candidate. The coordination ban also applies to interactions with agents of the candidate and campaign finance entity of a candidate, such as common vendors and employees (present and former).

Coordination may cause the Super PAC's disbursement to be considered an illegal, in-kind contribution if the amount expended exceeds the limit on contributions to the relevant candidate. Such activity can lead to intrusive investigations, significant penalties, and even criminal prosecution. To minimize these risks, every Super PAC should adopt and implement a coordination policy, provide training regarding the policy to its employees and vendors,

and exercise care in its interactions with candidates, campaigns, and political parties.

## ADVERTISING DISCLAIMERS

In general, any material publicly distributed by a Super PAC that contains text, graphic, or other images relating to a candidate or prospective candidate must include an "authority line" set apart from the rest of the message. The authority line must state the name of the committee responsible for the material, the name and address of the committee's treasurer (except that the address may be omitted if it is on file with the State Board of Elections), and, if the campaign material supports or opposes a candidate, must state that it has not been authorized or approved by any candidate. Maryland law spells out specific language for this disclaimer, as well as other disclaimer language required for public communications made through electronic media and in other special circumstances. Regulations promulgated by the Federal Communications Commission also apply to automated phone calls and broadcast television and radio ads.

## REPORTING

Maryland Super PACs must file pre-primary, pre-general, post-general, and annual reports with the State Board of Elections, as well as reports within 48 hours of spending $10,000 on independent expenditures or electioneering communications. Reports must include details regarding all contributions received and expenditures made. For independent expenditures and electioneering communications, the reports must also identify the candidate the communication supports or opposes, or, in the case of an electioneering communication, the candidate merely referred to in the communication.

Given the short turnaround time for these reports, it is important to have good accounting systems in place to make certain that the reports are accurate and filed on time.



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# Forming an Association Political Action Committee

VENABLE LLP ON POLITICAL LAW

VENABLE LLP

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

ARTICLES

June 2, 2010

# MYTHS ABOUT LOBBYING, POLITICAL ACTIVITY, AND TAX-EXEMPT STATUS


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*Many 501(c)(3) or 501(c)(6) organizations shy away from lobbying and other politically-related activities out of concern for their tax status. But by failing to employ lobbying and political tactics, associations may be neglecting activities that may be enormously helpful in carrying out their mission. This article explores and debunks some of the most common misconceptions in this area; the first section relates to 501(c)(3) organizations, and the second section relates to 501(c)(6) organizations.*


**501(c)(3)s**

*Myths abound about the permissible — or, more often, impermissible — lobbying and political activity of associations and other 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) entities unnecessarily inhibit their organizations from most fully and effectively furthering their missions.*

**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 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, and also other activities. It does not specify exactly how much of an organization's funds may be spent on lobbying, nor does it specify exactly what constitutes lobbying.

***501(h) Election:*** The statute and regulations governing organizations that make the 501(h) election make clear which activities constitute lobbying and which do not. For example, lobbying occurs only when there is an *expenditure of money* by the 501(c)(3) 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 under the 1976 lobbying law may spend 20 percent of the first $500,000 of their annual expenditures on lobbying ($100,000), 15 percent of the next $500,000, and so on, up to $1 million dollars. With this hard cap on the amount of money that may be spent on lobbying, large 501(c)(3)s may not be able to make use of the 501(h) election.

**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) 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 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 elect, 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)s cannot support or oppose a specific bill or tell their members to do the same.**

501(c)(3)s that make the 501(h) election absolutely can support or oppose a bill and urge members to do likewise, but doing so is considered lobbying and, thus, expenditures made in connection with such actions will count toward the lobbying limit. Under the 501(h) election, generally, your organization is lobbying when it states its position on specific legislation to legislators or other government employees who participate in the formulation of legislation, or urge your members to do so (direct lobbying). In addition, your organization is lobbying when it states its position on legislation to the general public *and* asks the general public to contact legislators or other government employees who participate in the formulation of legislation (grassroots lobbying).

**Myth 4. 501(c)(3) organizations are not covered by the congressionally enforced federal 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 semi-annual reports concerning its lobbying activities if (1) the organization has at least one employee who is a "lobbyist" (using a combination of the tax law and LDA definitions of lobbying) *and* (2) the organization incurs or expects to incur expenditures on "lobbying activities" of $11,500 or more in a calendar quarter. Association leaders should 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 (hereinafter, "electing group") may use the tax law definition of "influencing legislation" and the tax rules for computing lobbying expenditures for purposes of making semi-annual reports under the LDA. (The LDA only allows 501(c)(3)s to use a combination of the LDA and tax code definitions of lobbying for purposes of determining whether an organization is required to make its initial lobbying registration.) An organization is not required to register under the LDA if its lobbying expenditures do not exceed $11,500 during the relevant quarterly periods and/or if none of its employees devotes 20 percent or more of his or her time to "influencing legislation" (as defined by a combination of the tax law and LDA definitions of lobbying). For outside lobbyists (i.e., lobbying firms) hired to lobby on behalf of a 501(c)(3) or other organization, it must receive income from a client of $3,000 or more during the quarterly period.

**Myth 5. Encouraging the members of a 501(c)(3) 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.*

**Myth 6. 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 7. 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, no prohibition exists on this practice if the information is presented and disseminated during political

campaigns, as long as it is done in the same manner as it is at other times. A problem arises if an organization waits to disseminate voting records until a campaign is underway. If your organization has not published records regularly throughout the year, your group may not, during the campaign, publish a recap of votes throughout the legislative session.

**Myth 8. 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) and to the general public. However, 501(c)(3)s may not publish or distribute *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) 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.*

**Myth 9. 501(c)(3)s cannot engage in get-out-the-vote and voter registration drives.**

Not true. A 501(c)(3) can conduct nonpartisan get-out-the-vote and voter registration drives. The campaign must be focused solely on the importance of voting and how to register. There can be no evidence of bias for a particular candidate.

**Myth 10. Employees of 501(c)(3)s 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 11. 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 related 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 may not engage in political 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 leases 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.

**501(c)(6)s**

**Myth 1. A 501(c)(6) is limited on how much lobbying it can do.**

Not true. Neither federal tax law nor the IRS has put any limits on how much a 501(c)(6) can spend on lobbying. In fact, depending on its purposes, in certain cases, all of a 501(c)(6)'s revenues could be spent on lobbying.

**Myth 2. Membership dues paid to 501(c)(6) associations that lobby are fully tax-deductible (as business expenses) by members.**

Not true. The federal lobbying tax law, found in Section 162(e) of the Internal Revenue Code, denies a business tax deduction for all lobbying and political activity expenses incurred by businesses. The law also requires that membership dues paid to 501(c)(6) trade or professional associations be treated as nondeductible business expenses to the extent of the association's lobbying and political activity. Therefore, 501(c)(6) associations that lobby must track their lobbying and political activity expenditures and then report to their members each year the percentage of their membership dues that are nondeductible as a result of these expenditures (or, alternatively, the association can elect to pay a "proxy tax" directly on these amounts to the IRS).

**Myth 3. Association expenses to administer and solicit contributions to a Political Action Committee are not lobbying.**

Not true. All association expenses related to political campaigns and PACs must be counted as lobbying for purposes of the federal lobbying tax law. While under federal election law, the Federal Election Commission ("FEC") permits associations with "connected" PACs to pay the costs of administering and soliciting contributions to the connected PAC, all of these association-incurred expenses must be included in the association's lobbying expenditures for purposes of the lobbying tax law.

**Myth 4. A 501(c)(6) cannot endorse candidates for elected office.**

Not true. A 501(c)(6) can endorse federal or state candidates for public office. The organization may communicate the endorsement to its membership and share the endorsement with the organization's press list. In its communications to members, the organization can expressly advocate for the election or defeat of a specific candidate. Under the recent Supreme Court decision in ***Citizens United v. FEC***, 501(c)(6) organizations may also expressly advocate to the general public, as long as those activities are not coordinated with candidates.

**Myth 5. A 501(c)(6) cannot make cash or in-kind contributions to candidates for state office.**

Not necessarily true. Depending on state law, in certain states, a 501(c)(6) can, in fact, make direct cash and in-kind contributions to candidates for state public office. Under federal law, however, no corporation—including nonprofits—may make cash or in-kind contributions to federal candidates. Moreover, organizations that make direct contributions to state candidates must be careful of the tax consequences: Section 527(f) of the Internal Revenue Code may impose significant taxes on associations that do not properly segregate their political funds.

**Myth 6. A 501(c)(6) risks its exempt status if it publishes a voter guide or legislative scorecard.**

Not true. A 501(c)(6) has more leeway on scorecards and guides than a 501(c)(3). It may produce a voter guide that is somewhat biased and is intended to influence the election through its issue selection and targeted distribution. Moreover, the guide may contain express advocacy for particular candidates, as long as the guide is reported to the FEC as an independent expenditure (see Myth 8 below). A good example of a permissible voter guide would be one that lists all Members of Congress and how they voted on the association's top five legislative issues in the most recent congressional session.

**Myth 7. 501(c)(6)s cannot engage in get-out-the-vote and voter registration drives.**

Not true. A 501(c)(6) can conduct partisan get-out-the-vote and voter registration drives. Both the IRS and FEC allow a 501(c)(6) to conduct theme-based voter registration or get-out-the-vote drives aimed at the general public as long as the drive avoids expressly advocating any particular candidate's election or defeat, and is not coordinated with the candidate.

**Myth 8. 501(c)(6)s cannot fund independent expenditures to support or oppose federal candidates.**

No longer true. Under the Supreme Court's recent decision in *Citizens United v. FEC*, a corporation may expressly advocate the election or defeat of a federal candidate. Many states that had laws similar to the federal restriction that the Supreme Court overturned have indicated that their laws are also likely unconstitutional. As such, 501(c)(6)s (and other nonprofit corporations other than 501(c)(3)s) will be able to fund television and radio commercials, buy ads in newspapers, endorse candidates on their web sites, send email to non-members, and conduct other public outreach. The only concern is that such activities cannot be coordinated with the candidate or political party—this transforms the independent expenditure into a prohibited contribution (unless your state law allows for corporate contributions).

It is also important to remember that expenditures are also subject to tax under section 527(f) of the tax code (as discussed in Myth 5). Federal law imposes disclosure requirements for independent expenditures and many states have similar laws for state or local candidates.

**501(c)(3) and 501(c)(6) Lobbying and Political Activity**
**QUICK REFERENCE CHART**

| **ACTIVITY** | **501(c)(3)** | **501(c)(6)** |
|---|---|---|
| Lobbying | Yes, and can advocate for or against specific legislation | Yes |
| Expenditure Limits | Yes, but with a sliding scale if organization elects 501(h) | None, but membership dues are not deductible based on amount of lobbying |
| Federal Lobbying Disclosure | Yes, if threshold met | Yes, if threshold met |
| Legislator scorecards / voting records | Yes, with limitations | Yes |
| Political Action Committees | Prohibited | Yes |
| Endorsing candidates | Prohibited | Yes |
| Contributions to candidates | None | None to federal candidates, but is permissible in certain states |
| Voter registration drives and education | Yes, but must be nonpartisan and focused on need to vote | Yes, and may be partisan |
| Express advocacy | Prohibited | Yes, as long as not coordinated with candidates |

VENABLE LLP

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December 1, 2010

# MYTHBUSTING THE TOP 10 FALLACIES OF 501(C)(3) LOBBYING


## AUTHORS

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*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.

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**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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