



# **Lobbying & Political Activities: Rules of the Road for Nonprofits**

April 12, 2012

12:00 p.m. – 2:00 p.m. EDT

Venable LLP

575 7<sup>th</sup> Street, NW

Washington, DC 20004

## **Moderator:**

Jeffrey S. Tenenbaum, Esq.

## **Panelists:**

Ronald M. Jacobs, Esq.

Jeffrey J. Hunter, Esq.

Alexandra Megaris, Esq.

VENABLE<sup>®</sup>LLP

# Presentation



## Lobbying & Political Activities: Rules of the Road for Nonprofits

Thursday, April 12, 2012  
12:30 p.m. – 2:00 p.m. EDT  
Venable LLP, Washington, DC

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## Upcoming Events

April 20, 2012 – Good Counsel: Meeting the Legal Needs of Nonprofits (Book Event and Cocktail Reception)

May 17, 2012 – Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls

June 13, 2012 – Ten Best Practices for Protecting Your Nonprofit's Intellectual Property

For more details, please visit [www.Venable.com/Nonprofits/Events](http://www.Venable.com/Nonprofits/Events).



## What will we cover?

### Lobbying Disclosure

- Counting Lobbying Activity
- Other LDA Reporting Issues
- State Reporting

### Gifts & Entertainment

- Federal Rules
- State Issues
- Compliance

### Super PACs

- History
- What is a Super PAC
- Reporting
- Coordination
- Nonprofit Contributions
- Nonprofit Independent Expenditures



## Lobbying Disclosure



## Tracking Lobbying Costs

- Two purposes:
  - Report on LDA
  - Tax
- Three definitions of lobbying activity:
  - Lobbying Disclosure Act
  - Tax code limits on lobbying by charities
  - Nondeductibility for businesses and associations



## Choosing a Definition

- **LDA:** Any organization may use the LDA method
- **IRC Section 4911(d):** Only a 501(c)(3) that has made the 501(h) election
- **IRC Section 162(e):** Only a business, 501(c)(5), or 501(c)(6)



## Three Lobbying Definitions

Type of Lobbying	LDA	Charities	Ass'n
State	No	Yes	Yes
Grassroots	No	Yes	Yes
Legislative	Yes	Yes	Yes
Executive	Broad	No	Narrow
International	No	Yes	Yes

## LDA Lobbying

- Communications with covered official regarding:
  - Formulation, modification, or adoption of Federal legislation (including legislative proposals)
  - Formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government
  - Administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license)
  - Nomination or confirmation of a person for a position subject to confirmation by the Senate

## Administrative Contacts

### Official

- President
- VP
- WH Office of EOP
- EOP
- ES Level 1
- ES Levels 2-5
- Flag Officers
- Schedule C

### LDA

- Yes
- Yes
- Yes
- Yes
- Yes
- Yes
- Yes
- Yes

### Ass'n

- Yes
- Yes
- Yes
- Yes <sup>2</sup> most senior in agency
- Yes and deputy
- No
- No
- No



## Legislation

### Officials

- Reps & Senators
- Congress-Staff
- LDA Covered Officials
- Other Government
- State Legislators & Staff
- State Executive Branch Officials

### LDA

- Yes
- Yes
- Yes
- No
- No
- No

### Charities

- Yes
- Yes
- Yes
- Yes
- Yes
- Yes

### Ass'n

- Yes
- Yes
- Yes
- Yes
- Yes
- Yes



## 501(c)(3) Lobbying

- Attempting to influence specific legislation
- Disclosure -
  - **Costs to the IRS:** Federal, State, Local, International, and Grassroots
  - **Lobbyists, Issues, and Contacts to Congress in LDA Reports:** Federal



## 501(c)(3) Lobbying

- “No substantial part” test:
  - Vague, facts and circumstances test
  - Strict sanctions
    - revocation of exempt status
    - excise tax on organization and its managers (5% of lobbying expenditures)
- 501(h) expenditure test:
  - Lobbying activity measured solely by the amount of money spent on lobbying
  - Lobbying will not be considered “substantial” provided organization does not exceed expenditure cap
  - Clear definitions of lobbying and exclusions for specific activities
  - Must affirmatively elect to use by filing IRS Form 5768
  - Flexible sanctions
    - 25% tax on amount spent over the cap
    - No tax penalties imposed on organization managers for exceeding the limits
    - Revocation of exempt status results only if the organization exceeds 150% of the cap over a four-year consecutive averaging period





## 501(c)(6) Lobbying

- Attempting to Influence Specific Legislation
- Intervening in Elections
- Grassroots
- Administrative Actions or Positions
- Disclosure -
  - **Costs to the IRS and Members:** All Legislation, Grass-roots, Administrative Action, and Election Intervention
  - **Lobbyists, Issues, and Contacts to Congress in LDA Reports:** Federal



## LDA vs. IRC Pros/Cons

- LDA Definitions
  - **Pro:** Simple, same definitions and covered officials
  - **Con:** May require more disclosure
- IRC Definitions
  - **Pro:** Calculate expenditures only once
  - **Pro:** Most agency lobbying is not LDA-reportable
  - **Pro:** Likely fewer employee lobbyists
  - **Con:** Complicated, must still use LDA definitions for Capitol Hill lobbying
  - **Con:** Inflated expenditures



## Lobbying Reports



## Who is a Lobbyist?

- More than one lobbying contact
- AND
- More than 20% of time on lobbying activities in three-month period



## Lobbying Activities

- Contacts + efforts in support of contacts:
  - Preparation and planning activities
  - Research and other background work intended for use in contacts (at the time it is performed)
  - Coordination of lobbying activities



## Quarterly LD-2 Reports

- Amount spent on lobbying
  - Rounded to nearest \$10,000
- Individual lobbyists who lobbied
- Issues lobbied
- House of Congress or agency lobbied



## The Amount Spent

- Employee Time
- Direct Costs
- Outside Lobbyists
- Lobbying-Related Dues
- Overhead



## Employee Time

- Will depend on method used
- Time spent on lobbying, which includes:
  - Legislation (Federal (LDA) and state (IRC))
  - Grassroots Lobbying (IRC)
  - Executive Branch Lobbying
  - Political Activities (e.g., PAC) (IRC)
  - All Supporting Activities
- This includes all employees, even those not listed as lobbyists



## Semiannual LD-203 Reports

- Semiannual disclosure of “political” contributions
- Certification of Gift Rule compliance
- By whom:
  - Organization
  - Each registered lobbyist must file the report
- Online system



## What Gets Reported

Federal Election Campaign Act

Honoring & Recognizing

Meetings

Presidential Library

Presidential Inaugural Committee



## Federal Election Campaign Act

- All contributions aggregating \$200 or more during the semiannual period given to:
  - Federal candidates
  - Leadership PACs
  - Political parties
- Must report the date and amount of each contribution
- Does not include state candidates or PACs



## Meeting Expenses

- To pay the costs of a
  - Meeting
  - Retreat
  - Conference
  - Other similar eventheld by, or in the name of, one or more covered legislative or executive branch officials



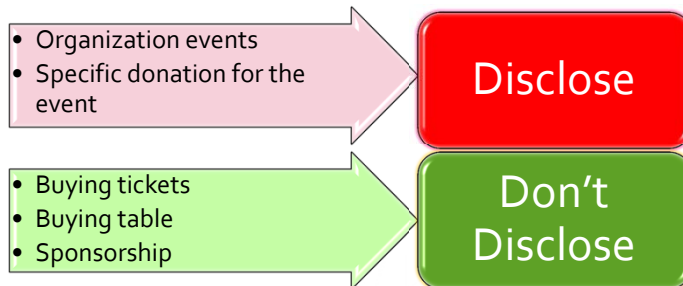
## Honorary Expenses

- Payments to entity named for covered legislative branch official
  - Endow a chair
- Payment in recognition of legislative official
  - Honorarium to charity
- Does not include covered executive officials



## Honoring & Recognizing

To pay the cost of an event to **honor** or **recognize** a covered executive or legislative branch official



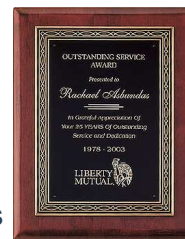
## Things Not Disclosed

- Things that do not make an event one to honor or recognize a covered official
  - Honorary co-hosts
  - “The Honorable”
  - Speaking events
  - Attendee or special invitee



## What is Reported?

- Costs of specific items (plaques, awards, etc.)
- Costs of the event
  - May not segregate costs
  - Dinner versus reception
- May list payee as “various vendors”
  - Must specifically list costs for gifts





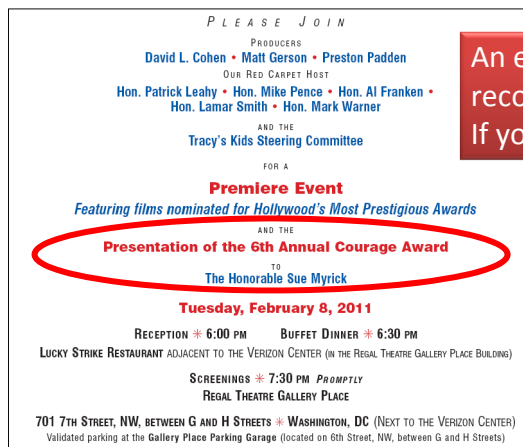
## Examples



- Honorary Hosts
- “The Honorable”
- Not an event to honor or recognize
- No Disclosure



## Examples



An event to honor or recognize:  
If your event, disclose



## Examples



Ticket purchase or contribution? Not careful phrasing

I/we will contribute to *And the Winner Is... Tracy's Kids* as a

- STUDIO HEAD ★ \$100,000**
  - ★ Corporate logo prominently displayed as a *STUDIO HEAD* on event signage.
  - ★ Corporate logo and identification prominently displayed at event.
  - ★ Acknowledgment during Speaking Program.
  - ★ Acknowledgment and corporate logo in the events section of the Tracy's Kids website.
  - ★ **100 TICKETS TO THE RED CARPET RECEPTION, AWARD CEREMONY AND SCREENINGS.**
- PRODUCERS ★ \$50,000**
  - ★ Corporate logo prominently displayed as a *PRODUCER* on event signage.
  - ★ Acknowledgment during Speaking Program.
  - ★ Acknowledgment and corporate logo in the events section of the Tracy's Kids website.
  - ★ **50 TICKETS TO THE RED CARPET RECEPTION, AWARD CEREMONY AND SCREENINGS.**
- DIRECTORS ★ \$25,000**
  - ★ Corporate name listed as a *DIRECTOR* on event signage.



## Solicitations by Officials

- To an entity:
  - Established
  - Financed
  - Maintained
  - Controlled
  - Designated by

Covered executive or legislative branch officials



## Solicitations by Officials

- “Designated” by a covered official
  - Must have some role in governance
    - “Honorary” or “ex officio” does not equal controlled
    - Voting Board membership is enough
  - Organization established before becoming covered official need not be reported (if no ongoing relationship)



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## Examples

**THE STATE SOCIETY OF IOWA**  
 In conjunction with  
 The Capital Area Iowa Club      University of Northern Iowa Alumni Association  
 Iowa State University Alumni Association      Drake University National Alumni Association

**Event Sponsors**  
 American ... Insurers  
 Honeywell  
 National Beer Wholesalers Association

**With Honorary Hosts**  
 Governor Chet Culver  
 Senator Chuck Grassley  
 Senator Tom Harkin  
 Congressman Leonard Boswell  
 Congressman Tom Latham  
 Congressman Steve King  
 Congressman Bruce Braley  
 Congressman David Loebsack

Invite you to  
  
**IOWA**  
 Disaster Relief  
**2008**

A FUNDRAISER TO BENEFIT  
 THE VICTIMS OF IOWA'S RECENT FLOODS AND  
 TORNADOES

**SUGGESTED MINIMUM CONTRIBUTION \$20**  
 Date: Monday June 23, 2008  
 Time: 8:00-9:00  
 Locations: 101 Constitution Avenue, NW, Rooftop, Washington, DC  
 Questions: social@iowasociety.org



All proceeds will be given to the relief efforts  
 The State Society of Iowa is a 501(c)(4) tax-exempt organization  
 Tax deductible charitable giving options are available

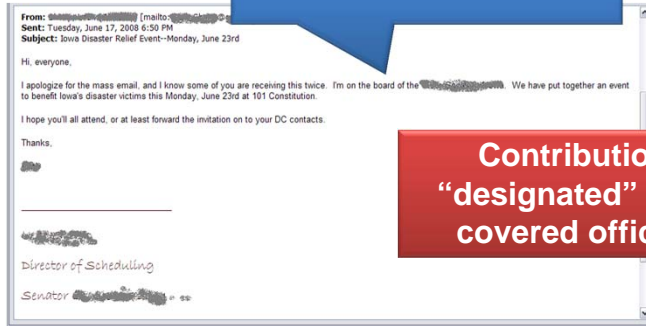
Just honorary co-hosts



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## Examples

I'm on the board



Contribution  
"designated" by a  
covered official



## State Lobbying Issues



## State Lobbying

Frequent  
Changes

No Uniform  
Rules

Different  
Triggers



## Scope of Lobbying

- Definition of “lobbying”
  - Legislative
    - Applies to virtually all states
    - Scope may be narrow or broad
  - Executive
    - May be limited to legislation
    - May include most administrative functions
  - Procurement



## Who Registers?

- Outside lobbyists
- In-house lobbyists
- The organization itself
  - For its own employees
  - For its contractors as a “lobbyist principal” or “lobbyist employer”



## Thresholds for Registration

- Amount of time
  - Percentage
  - Hours worked
- Amounts of money
  - Portion of salary spent on lobbying
  - Amount spent on gifts



## Reporting

- Timing of reports
- Method of reports
- Content of the reports
- Approval of the reports



## Reporting

- Who reports?
  - Individual lobbyist
  - Lobbyist employer
  - Outside lobbyist
- All may need to approve the reports of the others



## Reporting

- Issues lobbied
  - May require some detail
- Contacts made
  - Again, may go into detail
- Amount spent on lobbying
  - Internal costs
    - E.g., salary, travel, etc.
  - Gifts given



QUESTIONS?





## Gifts and Entertainment



## Federal Rules



## Giving Gifts:



### Congress

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



### Career

- Organization:
  - \$20 or exception
- Lobbyist:
  - \$20 or exception
- Others:
  - \$20 or exception



### Administration

- Organization:
  - No, unless exception
- Lobbyist:
  - No, unless exception
- Others:
  - \$20 or exception



## Exemptions for Gifts

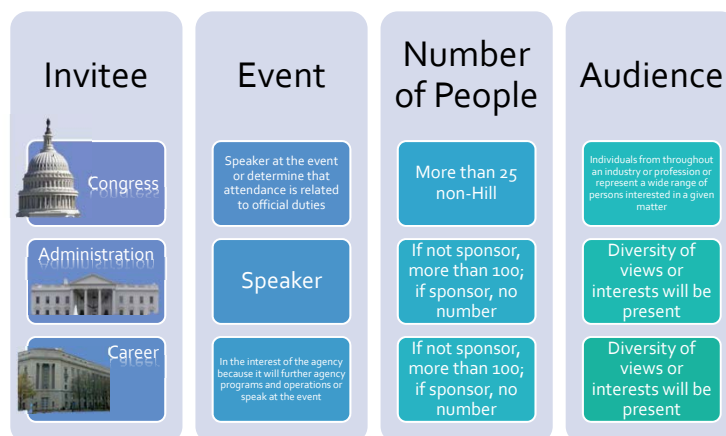


## Personal Friendship

- Cannot expense gifts
- Look to history of relationship
  - Mutual exchange of gifts
  - Duration and formation
  - Similar gifts to others
- Allows gifts up to \$250 (without waiver) for legislative branch—no limit on executive



## Widely Attended Events



## Widely Attended Events

- Allows for full meal
- Entertainment that is part of the event
  - Excludes entertainment that is collateral to the event
- Waiver of attendance fees (limit on executive branch)
- Examples:
  - Conferences
  - Trade Shows
  - Seminars



## Receptions



### Congress

- Food or drink of nominal value
- Offered other than as part of a meal



### Administration/Career

- Modest refreshments
- Not part of a meal
- Coffee, donuts, etc.



**No limit on number of attendees**

**May not be one-on-one**



## Charitable Events

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



## State Rules



## Vary Widely

- Exemptions
- Limits
- Lobbyist Gift Bans
- Lobbyist Registration
- Reporting
- Notifying Recipients



## Compliance with Gift Rules

- Know state rules
- Include on receipts/reimbursement forms:
  - Reimbursement for employee's portion of meal only; guest paid for own meal
- Review lobbying firm bills for meals/gifts
  - Include provisions in contracts
- Train Accounting to prevent reimbursement
- Train employees



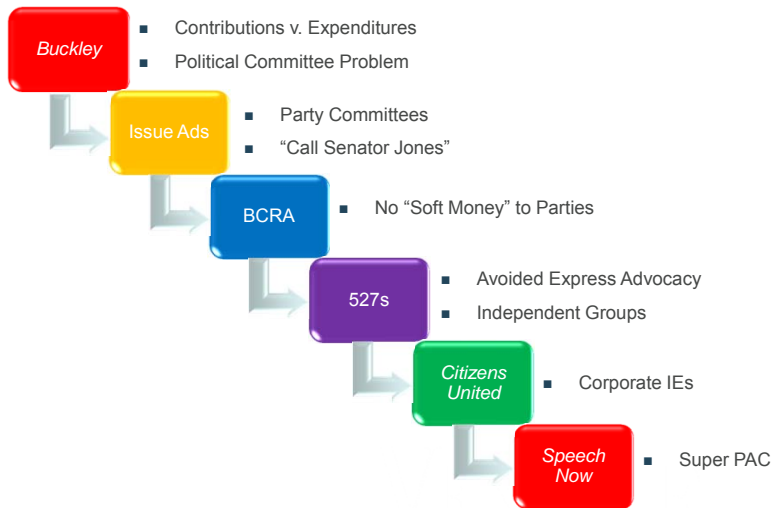
# QUESTIONS?



# The legal overview SUPER PACS



## History



## What is an IE Committee?



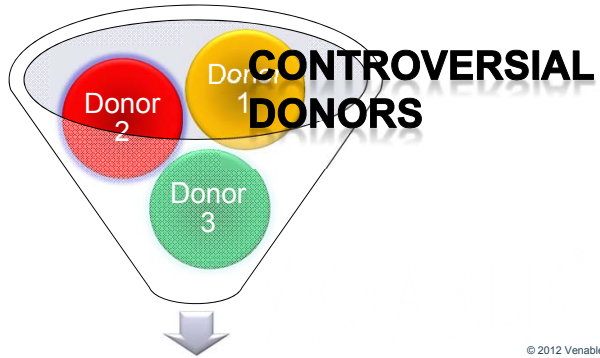
- Contributions In
  - Unlimited
  - Corporate
- No Contributions Out
- Disclosed to FEC
- No Coordination





## Disclosure

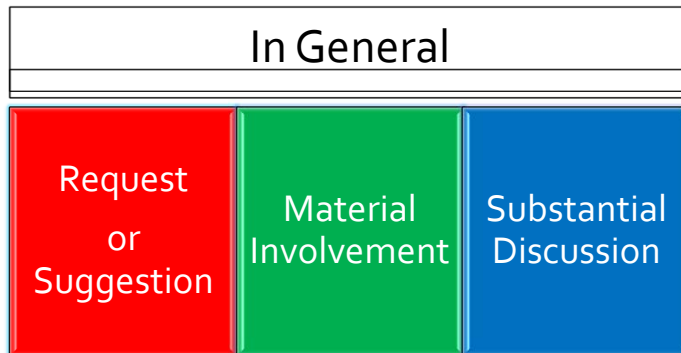
- 24- and 48-Hour Reports of Expenditures
- Quarterly or Monthly Reports of Contributions and Expenditures



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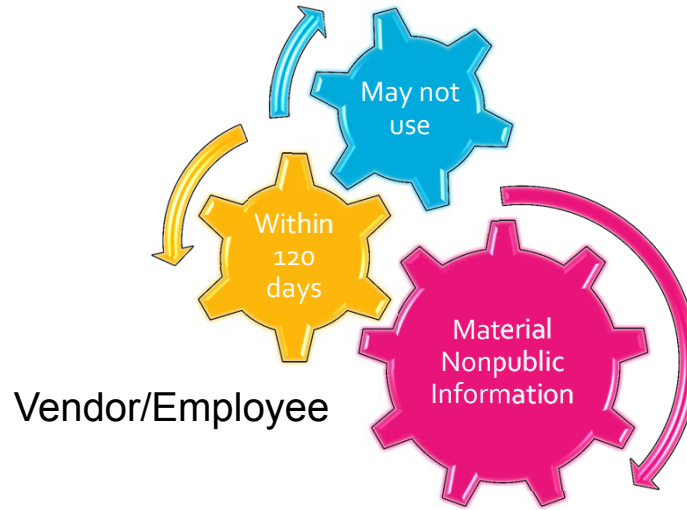
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## Coordination



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## Coordination



## Candidate Fundraising

- Appear at events
- Call donors
- Share contributor information
- Cannot ask for more than legal limits



## Paying for IEs Directly

- Cannot be done by 501(c)(3)s
- Disclosure
  - IE Reports
  - EC Reports
- Donor Issues
- Tax Limits
- Political Committee



## Contributing to IEs

- Tax limits
- Donor disclosure
- Solicitations



## QUESTIONS?

Venable LLP  
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# Speaker Biographies



## Jeffrey S. Tenenbaum

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### AREAS OF PRACTICE

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

### INDUSTRIES

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

### GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

### BAR ADMISSIONS

District of Columbia

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

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers 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. He also was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. He 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.

### HONORS

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

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

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

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

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

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

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

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV<sup>®</sup> Peer-Review Rated by *Martindale-Hubbell*

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

## EDUCATION

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

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

## MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

## ACTIVITIES

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

## PUBLICATIONS

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

## SPEAKING ENGAGEMENTS

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



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### AREAS OF PRACTICE

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 Political Law  
 Tax-Exempt Organizations  
 Foreign Corrupt Practices Act and  
 Anti-Corruption  
 Congressional Investigations  
 Appellate Litigation  
 Regulatory  
 Advertising and Marketing  
 Litigation

### INDUSTRIES

Nonprofit Organizations and  
 Associations  
 Consumer Products and Services  
 Life Sciences  
 Consumer Financial Protection  
 Bureau Task Force

### GOVERNMENT EXPERIENCE

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

### BAR ADMISSIONS

District of Columbia

Ronald Jacobs advises clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities. He also assists clients with crises response to government investigations and enforcement actions, Congressional investigations, class-action law suits, and other high-profile problems that involve potentially damaging legal and public-relations matters.

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

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

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

### SIGNIFICANT MATTERS

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

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



Virginia

## COURT ADMISSIONS

U.S. Supreme Court

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

U.S. Court of Appeals for the Federal Circuit

U.S. District Court for the District of Columbia

U.S. Court of Appeals for the Seventh Circuit

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

U.S. Court of International Trade

## EDUCATION

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

Order of the Coif

Articles Editor, *The George Washington Law Review*

Imogene Williford Constitutional Law Award

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

Omicron Delta Kappa

## MEMBERSHIPS

American Bar Association

Federalist Society, Free Speech and Election Law practice group

states.

- Successfully litigating a Hatch Act case before the Merit Systems Protection Board involving a school district's ability to re-hire a teacher previously dismissed for campaigning for public office.
- Reversing a decision by Immigration and Customs Enforcement to revoke a language school's accreditation.

## HONORS

Recognized in the 2011 edition of *Chambers USA*, (Band 3), Government: Political Law, National

## ACTIVITIES

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

## PUBLICATIONS

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

- March 28, 2012, It's a Bird, It's a Plane, No, It's a Super PAC!, *Inside Counsel*
- March 14, 2012, Four Ways Corporations Can Participate in Federal Elections, *Inside Counsel*
- March 2012, Forming a Corporate Political Action Committee
- February 22, 2012, Political Activity and the Board Room: Limiting Corporate Political Expenditures Through Disclosure, Corporate Law, and Shareholder Proposals, *Bloomberg Law Reports*
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- August 9, 2010, Effective 501(c)(3) Lobbying: 501(h) Election, No Substantial Part, and Creating Related Lobbying Organizations
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- July 31, 2009, Lobbying for Nonprofit Organizations: Tracking Political Activities Under the Tax Code and the Lobbying Disclosure Act, Political Law Alert
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- December 4, 2008, The New Form 990: Defusing Governance, Political Activities, Compensation, and Other Issues
- June 26, 2008, The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203
- June 2008, Watch That PAC! Six Simple Steps to Securing Your Political Committee
- February 15, 2008, Political Activity, Lobbying Law and Gift Rules Guide
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- August 2007, Capitol View: Changes to Ethics and Lobbying Laws Will Impact Business in Washington
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- February 28, 2006, Federal Court Preempts California Fax Law For Interstate Faxes: The Implications for Associations Nationwide
- October 24, 2005, California Tries to Play by Its Own Fax Rules: The Impact on Associations
- July 14, 2005, FEC Permits Trade Associations to Use Payroll Deductions for Their PACs
- July 11, 2005, Update on Fax Laws: Congress Restores the "Established Business Relationship" Exception for Commercial Faxes
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- July 28, 2003, FCC Issues New Unsolicited Fax Rules: Prior Written Consent Now Required for Most Faxes Sent to Members and Others
- July 28, 2003, Model Association Fax Consent Form
- May 1, 2003, Obtaining and Retaining Your Chapter's Corporate and Tax Status
- April 23, 2003, Online Privacy and Security for the Mortgage Industry, *Mortgage Bankers Association Legal Issues/Regulatory Compliance Conference*
- January 8, 2003, The Telemarketing Sales Rule and Associations
- April 1, 2002, Associations and Campaign Finance Reform
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- 2001, Defining the Line Between State and Federal Governance, *Foreword, The George Washington Law Review*

## 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.

- May 8, 2012, Legal Quick Hit: "Election Year Issues for 501(c)(3) Organizations" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 12, 2012, Lobbying & Political Activities: Rules of the Road for Nonprofits
- April 11, 2012, "Best Practices for Investment Advisers to Avoid Violating Pay to Play Regulations," IAA Legal & Regulatory Webinar
- March 14, 2012, SuperPAC Panel and Political Law Networking Reception at George Washington University
- November 29, 2011, "Pay-to-Play: Best Practices for Investment Advisers" webinar
- October 11, 2011, Legal Quick Hit: "Government Investigations and Nonprofits: At Least Two Branches Are Out to Get You"
- September 16, 2011, "Practical Advice for Navigating Your Way through Political Law" at the Annual American Society of Association Executives Association Law Symposium
- June 22, 2011, "Play on Natural Turf: Authentic and Transparent Grassroots Lobbying" for the American Society of Association Executives
- May 16, 2011, "Online Advocacy: Rules for the Road" for American League of Lobbyists (ALL)
- May 14, 2011, "Federal Ethics and Lobbying Rules" for the Tax Coalition
- May 9, 2011, "Proactive Lobbying: Compliance & Strategy" for the Tax Foundation
- March 28, 2011, "Grassroots, Grasstops, Coalition Building: Best Practices, Cost-Effective Tools and Social Media," hosted by American League of Lobbyists (ALL)
- February 14, 2011, "LDA, HLOGA and FARA: Filings, Regulatory Changes and What the Laws Require" for American League of Lobbyists (ALL)
- January 20, 2011, "New Year's Resolution: Stay on Top of Lobbying & Political Giving Rules" webinar hosted by Venable LLP
- November 17, 2010, "Accounting for Lobbying Costs" meeting with the Trade Association Controller's Network
- August 10, 2010, Legal Quick Hit: "Effective 501(c)(3) Lobbying: The 501(h) Election, No Substantial Part Test, and Creating Lobbying Affiliates" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- July 22, 2010, "Political Law After *Citizens United* - Understanding Major Changes for Campaigning and Lobbying" for West LegalEdcenter
- June 7, 2010, "LDA, HLOGA and FARA: Filings, Regulatory Changes and What the

Laws Require" for American League of Lobbyists (ALL)

- May 10, 2010, "Legal Issues in Grassroots Lobbying," for the American League of Lobbyists' Lobbyist Certification Program
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- February 18, 2010, "Legal Issues 2010: Keeping Your Association Out of Trouble" for the American Association of Medical Society Executives
- February 1, 2010, Online Advocacy: Best Practices, Cost-Effective Tools and Guidance to Meet the Challenge
- January 23, 2010, "Legal Issues for Executive Directors" to the National Sheriffs' Association
- June 23, 2009, TechAmerica Procurement Policy Webinar Series
- June 8, 2009, "Legal Issues on Grassroots Lobbying" to the American League of Lobbyists
- May 11, 2009, LDA, HLOGA and FARA: Filings, Regulatory Changes and What the Laws Require
- March 16, 2009, National Council of Higher Education Loan Programs
- February 23, 2009, Online Advocacy: Best Practices, Cost-Effective Tools and Guidance to Meet the Challenges
- December 4, 2008, Implementing the New IRS Form 990 Audioconference
- June 26, 2008, The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203
- June 26, 2008, Filing the LD-203: Preparing Associations for July Lobbying Filings
- February 11, 2008, Lobbying Law for Associations
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- December 7, 2007, Committee for Education Funding
- May 19, 2004, American Staffing Association Capitol Hill Day
- March 10, 2004, Education Finance Council Annual Meeting
- February 26, 2004, Online/Teleconference for American Chamber of Commerce Executives
- December 16, 2003, Greater Washington Society of Association Executives' "The New Federal Spam Law: What Does It Mean for Your Association?"
- August 14, 2003, Do Not Fax After August 25: Complying with the FCC's New Fax Ban
- July 23, 2003, Do Not Call, Fax or Email: New Marketing Challenges for Associations
- May 3, 2003, Alexander Graham Bell Association for the Deaf and Hard of Hearing
- May 1, 2003, Obtaining and Retaining Your Chapter's Corporate and Tax Status
- April 23, 2003, Online Privacy and Security for the Mortgage Industry
- April 23, 2003, Mortgage Bankers Association Legal Issues/Regulatory Compliance Conference
- March 25, 2003, Greater Washington Society of Association Executives Campaign Finance Forum



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### AREAS OF PRACTICE

Political Law  
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New Media, Media and Entertainment  
Education  
Life Sciences  
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### BAR ADMISSIONS

District of Columbia  
Virginia

### EDUCATION

J.D., *cum laude*, Georgetown University Law Center, 2006  
B.S., Political Science, Utah State University, 1996

Jeff Hunter brings years of national campaign and public advocacy organization staff experience to his practice, augmenting legal analysis with a deep understanding of political organizations' operational needs. He advises clients on all aspects of federal and state political compliance law. This includes helping clients to comply with campaign finance, lobbying disclosure, ethics and gift rule, pay-to-play, and Federal Communications Commission political advertising requirements. Forming, reporting for, and maximizing PACs' success are regular components of his campaign finance practice. He advises businesses and nonprofits regarding IRS regulation of political activity and options regarding the benefits and restrictions of choosing one nonprofit form over others.

Mr. Hunter focuses on helping clients meet their organizational goals while maintaining full compliance. In cases where the press or enforcement agencies question a client's compliance, Mr. Hunter assists the client throughout the process to final resolution. He is sensitive to clients' need to avoid reputational damage from adverse publicity and assists clients in responding to press inquiries. Mr. Hunter has represented Fortune 500 companies and leading trade associations successfully in federal and state political compliance agencies' enforcement proceedings.

Mr. Hunter practiced for six years at another prestigious national law firm in Washington, DC before joining Venable.

### REPRESENTATIVE CLIENTS

- Electric, gas, and telecommunication utilities
- Television, newspaper, and Internet media
- Power generation and electric transmission
- Medical and mental health care providers
- Lobbyists and lobbying firms
- Trade associations
- 501(c)(3) charitable organizations
- 501(c)(4) social welfare organizations

### SIGNIFICANT MATTERS

- Implementing comprehensive federal and multistate political compliance systems;
- Implementing sophisticated PAC fundraising techniques for corporate PACs to maximize performance;
- Counseling clients in expanding their political activities through express advocacy communications permitted under the U.S. Supreme Court's 2010 *Citizens United v. Federal Election Commission* decision;

## MEMBERSHIPS

Federal Communications  
Commission Bar Association  
Republican National Lawyers  
Association

- Forming a Non-Governmental Organization and providing guidance regarding United Nations and U.S. Agency for International Development NGO accreditation;
- Advising U.S. subsidiaries of UK businesses and U.S. organizations that do business in the UK regarding the impact of the United Kingdom Bribery Act of 2010 on their U.S. operations;
- Advising New York-based clients regarding compliance with the New York Public Integrity Reform Act of 2011;
- Representing businesses and nonprofits successfully before state and U.S. Federal Election Commission, Federal Communications Commission, Clerk of the House, Secretary of the Senate, and Department of Justice in connection with regulatory compliance and enforcement proceedings.

## ACTIVITIES

Mr. Hunter presents political compliance training seminars, panel discussions, and Continuing Legal Education courses to lobbyists, compliance directors, PAC administrators, and other attorneys.

## PUBLICATIONS

- March 2012, Forming a Corporate Political Action Committee
- January 2012, Forming an Association Political Action Committee
- October 28, 2011, Communicating with Members after *Citizens United*

## SPEAKING ENGAGEMENTS

- April 12, 2012, Lobbying & Political Activities: Rules of the Road for Nonprofits



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Services  
Nonprofit Organizations and  
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### BAR ADMISSIONS

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### EDUCATION

J.D., Fordham University School of  
Law, 2008  
B.A., University of Pennsylvania,  
2005

Alexandra Megaris is an associate in Venable's regulatory practice group, where she focuses on transactional, regulatory, and policy matters in a broad range of industries. Ms. Megaris assists clients with ongoing compliance with all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, and pay-to-play laws. She also advises clients on a variety of advertising, marketing, communications, and general business issues, including compliance with the FTC Act, the Children's Online Privacy Protection Act, the Children's Television Act, the Telephone Consumer Protection Act, and the FTC's Telemarketing Sales Rule.

In addition, she assists clients with civil and criminal investigations before the United States Congress, the Federal Trade Commission, the Department of Justice, and various other federal and state agencies.

While in law school, Ms. Megaris interned for the Honorable Loretta A. Preska of the United States District Court for the Southern District of New York and for the United States Attorney's Office for the Eastern District of New York.

### PUBLICATIONS

- February 22, 2012, Political Activity and the Board Room: Limiting Corporate Political Expenditures Through Disclosure, *Corporate Law*, and Shareholder Proposals, *Bloomberg Law Reports*
- December 13, 2011, The Nuts and Bolts of Lobbying for 501(c)(3) and 501(c)(6) Exempt Organizations
- November 17, 2011, Avoiding Internet Advertising and Recruitment Pitfalls
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## SPEAKING ENGAGEMENTS

- April 12, 2012, Lobbying & Political Activities: Rules of the Road for Nonprofits
- December 13, 2011, "The Nuts and Bolts of Lobbying for 501(c)(3) and 501(c)(6) Exempt Organizations" for CooperationWorks!
- November 17, 2011, "Avoiding Internet Advertising and Recruitment Pitfalls" webinar for APSCU
- October 11, 2011, Legal Quick Hit: "Government Investigations and Nonprofits: At Least Two Branches Are Out to Get You"
- June 22, 2011, "Play on Natural Turf: Authentic and Transparent Grassroots Lobbying" for the American Society of Association Executives
- January 20, 2011, "New Year's Resolution: Stay on Top of Lobbying & Political Giving Rules" webinar hosted by Venable LLP



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## Lobbying for 501(c)(3) Organizations Tracking Political Activities under the Tax Code and the Lobbying Disclosure Act

501(c)(3) organizations that engage in federal lobbying are subject to at least two separate legal definitions of lobbying in order to comply with applicable federal tax and disclosure laws. The Internal Revenue Code (the “Code”) includes a definition of “lobbying” that applies specifically to “public charity” organizations recognized as exempt under Section 501(c)(3) of the Code. The federal Lobbying Disclosure Act (the “LDA”) provides a second—and very different—definition of the term “lobbying.”

### Section 501(c)(3) Public Charities

Nonprofit organizations that qualify for federal income tax exemption as public charities<sup>1</sup> under Section 501(c)(3) of the Code have a favorable tax status, but are also subject to **heightened restrictions** on lobbying and political activities. Section 501(c)(3) provides that “no substantial part” of a public charity’s activities may be lobbying; exceeding the “substantial part” limit places such an organization at risk of losing its tax-exempt status. Further, 501(c)(3) organizations are prohibited by the Code from engaging in any political activities. The Code provides organizations with two options for tracking and reporting lobbying activities—the “no substantial part” test, and the 501(h) election.

### The No Substantial Part Test

The “no substantial part” test is subjective. The IRS applies the standard on a case-by-case basis and has provided little guidance to organizations that seek to operate under this rule alone. Moreover, the definition of “lobbying” under the test is vague—it includes “attempting to influence legislation by propaganda or otherwise” and advocating “proposing, supporting, or opposing of legislation.”

<sup>1</sup> Note that this brief article does not discuss the application of 501(c)(3) lobbying restrictions to private foundations.

## **The 501(h) Election**

Alternatively, 501(c)(3) entities that lobby may choose to make the so-called “lobbying election” under [Section 501\(h\)](#) of the Code. Electing organizations are governed by the “[expenditure test](#),” a mathematical formula that limits the amount a 501(c)(3) entity may spend on lobbying activities but provides specific definitions of “lobbying.” Under [Section 4911\(c\)\(2\)](#) of the Code, the annual limit on lobbying expenditures is the sum of:

- 1) Twenty percent of the first \$500,000 of an organization’s exempt purpose expenditures; plus
- 2) Fifteen percent of the second \$500,000 of such expenditures; plus
- 3) Ten percent of the third \$500,000 of such expenditures; plus
- 4) Five percent of the remainder of such expenditures.
- 5) This limit is subject to an overall cap of \$1 million in annual lobbying expenditures.

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

## **“Lobbying” Defined**

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

- 1) “[Direct lobbying](#)” is any attempt to influence legislation through communication with a member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation. “Direct lobbying” also includes communications by an organization to its members, directly encouraging those members to engage in direct lobbying.
- 2) “[Grassroots lobbying](#)” is any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof. An organization engages in “grassroots lobbying” when, directly or through its members, it urges the public to contact legislators, provides the public with contact information for a legislator, or identifies a legislator’s position on a pending legislative matter.

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

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

- 1) Lobbying does not include providing technical assistance or advice to a governmental body or committee in response its unsolicited, written request, provided that (a) the request comes from more than one member of the body or committee, and (b) the response is made available to every member of the body or committee.
- 2) Lobbying does not include so-called “self-defense activities”—i.e., communications concerning decisions that may affect an organization’s

existence, powers, duties, 501(c)(3) status, or deductibility of contributions.

3) Lobbying does not include nonpartisan analysis, study, or research that may advocate a particular view, provided that (a) presentation of the relevant facts is sufficient to enable readers to reach an independent conclusion, and (b) distribution of the results is not limited to or directed toward persons solely interested in one side of a particular issue.

### **Lobbying Disclosure Act**

In addition to tracking lobbying activities under the Code, organizations that lobby are also [required to register](#) under the LDA if one or more of their employees spends more than twenty percent of his or her time on lobbying activities. Registered organizations must submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. The LDA definition of “lobbying” differs significantly from the definition used for the 501(h) election.

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

Under the LDA, [“lobbying contacts”](#) are the actual communications with “covered officials.” Lobbying contacts may be oral, written, or electronic. A contact is not a lobbying contact unless it involves:

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

There are a number of [exceptions](#) to these four categories. The following types of communication do not constitute “lobbying contacts” (and therefore preparation for such contacts does not constitute “lobbying activity”) and are particularly relevant to nonprofit organizations:

- 1) Administrative requests, such as requests for a meeting or about the status of a matter;
- 2) Testimony given before a committee or sub-committee of Congress;
- 3) Speeches, articles, or publications made available to the public or distributed through radio, television, or other methods of mass communication;
- 4) Information provided in writing in response to a request by a covered official;
- 5) Information required by subpoena, CID, or otherwise compelled by the federal government (including information compelled by a contract, grant, loan, permit, or license);
- 6) Communications in response to a notice in the Federal Register and directed toward the official listed in the notice;
- 7) Written comments filed in the course of a public meeting;

- 8) Any communication that is made on the record in a public proceeding; and
- 9) Petitions for agency action made in writing and made part of the public record.

The term “[covered legislative branch official](#)” includes all elected Members of Congress and the Senate, as well as all employees and officers of Congress. The definition of “[covered executive branch officials](#)” is more specific. It includes:

- 1) The President;
- 2) The Vice President;
- 3) Any member of the uniformed services whose pay or grade is at or above O-7;
- 4) Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
- 5) Any officer or employee in a position listed in levels I through V of the Executive Schedule; and
- 6) Schedule C political appointees.

The “[Executive Schedule](#)” delineates the most senior positions in the administration. [Schedule C](#) posts are typically non-career policymaking or “political” appointees, confidential secretaries, and administrative assistants of key appointees within an agency.

Even if a communication is directed to a covered official—e.g., a Schedule C appointee at a government agency—it is not a lobbying contact if the communication is otherwise made part of the public record before the agency (e.g., through a formal docketing process).

### **Reporting Expenses under the LDA**

Although many 501(c)(3) organizations are subject to both Code and LDA reporting requirements for lobbying, a provision of the LDA permits organizations to track and disclose lobbying expenditures using the Section 4911 definition rather than the LDA definition. For many organizations, the LDA definition is far narrower than “lobbying” as it is described in the Code.

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

### **Additional Resources**

Statutes, Regulations, and Other Government Resources

*For 501(c)(3) Organizations*

- [Section 501\(c\)\(3\)](#) of the Internal Revenue Code
- [Section 4911\(d\)](#) of the Internal Revenue Code, “Influencing legislation”
- IRS summary of “[501\(c\)\(3\) Lobbying](#)”
- IRS summary of “[Measuring Lobbying Activity: Substantial Part Test](#)”

- IRS summary of “[Measuring Lobbying Activity: Expenditure Test](#)”
- IRS [Form 5768](#), “Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation.”

*For LDA Registrants*

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

**Venable Resources**

- [Legislative and Executive Branch Lobbying Changes and Increased Contribution Limits](#), D. E. Wilson, Jr., Ronald M. Jacobs, and Aaron H. Hiller, January 2009
- [FEC Enacts New Fundraising Regulations](#), Ronald M. Jacobs and Aaron H. Hiller, December 2009
- [The New Form 990: Defusing Governance, Political Activities, Compensation, and Other Issues](#), Jeffrey S. Tenenbaum, Ronald M. Jacobs, and Aaron H. Hiller, December 4, 2009
- [The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203](#), Jeffrey S. Tenenbaum and Ronald M. Jacobs, June 26, 2008
- [Playing Politics: A Menu of Options for Associations to Consider](#), Ronald M. Jacobs and Aaron H. Hiller, June 2008
- [Political Activity, Lobbying Law and Gift Rules Guide](#), George E. Constantine and Ronald M. Jacobs, February 15, 2008
- [Myths about Lobbying, Political Activity, and Tax-Exempt Status](#), Jeffrey S. Tenenbaum, June 5, 2007

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## Lobbying for Nonprofit Organizations Tracking Political Activities under the Tax Code and the Lobbying Disclosure Act

Nonprofit organizations conducting federal lobbying are subject to two separate definitions of lobbying. Section 162(e) of the Internal Revenue Code (the “Code”) defines “lobbying” and requires most tax-exempt organizations either to pay a proxy tax on lobbying expenditures or inform their members that a portion of their dues are non-deductible. The federal Lobbying Disclosure Act (the “LDA”) provides a second—and very different—definition of “lobbying,” which requires organizations to track and disclose the amount spent on such activities.

Organizations that can show that ninety percent of their members do not deduct their dues are not required to provide notice to their members of the non-deductibility of lobbying expenses, or to report the amount spent on lobbying activities on their informational returns. Please note that 501(c)(3) organizations are subject to a different definition of “lobbying” under the Code. For more information on lobbying as it affects 501(c)(3) organizations, please see [Lobbying for 501\(c\)\(3\) Organizations](#).

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### Section 162(e)

[Section 162\(e\)](#) of the Code denies a deduction for lobbying expenditures. Most trade and professional organizations exempt under 501(c)(6), labor unions and farm bureaus exempt under 501(c)(5), and most taxable business entities are subject to the requirements of Section 162(e).

Membership organizations that are subject to Section 162(e) and engage in lobbying activities may either: (1) disclose to their members what percentage of their dues are nondeductible because they are used for lobbying; or (2) pay a 35-percent proxy tax on lobbying expenditures. Regardless of the method chosen, they must disclose the amount spent lobbying on their Form 990 informational returns. Most membership organizations choose to report the nondeductible amount to their members.

“[Lobbying](#)” under Section 162(e) includes five broad categories of activity:

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

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

### **Lobbying Disclosure Act**

In addition to tracking lobbying activities under the Code, organizations that lobby are also [required to register](#) under the LDA if one or more of their employees spends more than twenty percent of his or her time on lobbying activities. Registered organizations must submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. The LDA definition of “lobbying” differs significantly from the definitions found in the Code.

Under the LDA, “[lobbying activities](#)” include “lobbying contacts” as well as efforts in support of such contacts, including preparation and planning activities, research, and other background work that is



intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

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

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

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

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

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

- 1) The President;
- 2) The Vice President;
- 3) Any member of the uniformed services whose pay or grade is at or above O-7;
- 4) Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office

of the President;

5) Any officer or employee in a position listed in levels I through V of the Executive Schedule; and

6) Schedule C political appointees.

The “[Executive Schedule](#)” delineates the most senior positions in the administration. [Schedule C](#) posts are typically non-career policymaking or “political” appointees, confidential secretaries, and administrative assistants of key appointees within an agency.

Even if a communication is directed to a covered official—e.g., a Schedule C appointee at a government agency—it is not a lobbying contact if the communication is otherwise made part of the public record before the agency (e.g., through a formal docketing process).

### **Reporting Expenses under the LDA**

Although many organizations are subject to both Code and LDA reporting requirements for lobbying, a provision of the LDA permits organizations to track and disclose lobbying expenditures using the applicable Code definition rather than the LDA definition. For many organizations, the LDA definition is far narrower than “lobbying” as it is described in the Code.

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

### **ADDITIONAL RESOURCES**

Statutes, Regulations, and Other Government Resources

*For All Non-501(c)(3) Tax Exempt Entities*

- [Tax Information for Charities & Other Non-Profits](#), Internal Revenue Service
- [Section 162](#) of the Internal Revenue Code
- [26 C.F.R. § 1.162-28](#), “Allocation of costs to lobbying activities”
- [26 C.F.R. § 1.162-29](#), “Influencing legislation”
- IRS summary of “[Nondeductible Lobbying and Political Expenditures](#)”
- *For LDA Registrants*
- [Office of Public Records](#), U.S. Senate
- [Office of the Clerk](#), U.S. House of Representatives
- [Lobbying Disclosure Act Guidance](#), Office of the Clerk, U.S. House of Representatives
- *United States Government Policy and Supporting Positions* (the “[Plum Book](#)”), listing all employees of the federal government (including Executive Schedule and Schedule C employees)
- [5 U.S.C. § 7511\(b\)\(2\)](#), defining Schedule C employees

### Venable Resources

- [Legislative and Executive Branch Lobbying Changes and Increased Contribution Limits](#), D. E. Wilson, Jr., Ronald M. Jacobs, and Aaron H. Hiller, January 2009
- [FEC Enacts New Fundraising Regulations](#), Ronald M. Jacobs and Aaron H. Hiller, December 2009
- [The New Form 990: Defusing Governance, Political Activities, Compensation, and Other Issues](#), Jeffrey S. Tenenbaum, Ronald M. Jacobs, and Aaron H. Hiller, December 4, 2009
- [The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203](#), Jeffrey S. Tenenbaum and Ronald M. Jacobs, June 26, 2008
- [Playing Politics: A Menu of Options for Associations to Consider](#), Ronald M. Jacobs and Aaron H. Hiller, June 2008
- [Political Activity, Lobbying Law and Gift Rules Guide](#), George E. Constantine and Ronald M. Jacobs, February 15, 2008
- [Myths about Lobbying, Political Activity, and Tax-Exempt Status](#), Jeffrey S. Tenenbaum, June 5, 2007

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## Who is a Lobbyist?

The LDA defines a lobbyist as anyone who makes more than one **lobbying contact** *and* spends more than 20 percent of his or her time on **lobbying activities**.

## What are Lobbying Contacts?

Lobbying contacts are actual communications with covered officials. Lobbying contacts may be oral, written, or electronic. A communication with a covered official is not a “lobbying contact” unless it involves:

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

*Exceptions:* The following communications are *not* “lobbying contacts” under the LDA, although they may constitute “lobbying activities” if made in support of other communications that constitute lobbying contacts:

### **Miscellaneous Contacts**

- 1.) administrative requests such as requests for a meeting or about the status of a matter (as long as the request does not include an attempt to influence a covered official);
- 2.) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;
- 3.) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

## **Public Activities**

- 4.) testimony given before a committee or subcommittee of Congress (that is included in the public record);
- 5.) speeches, articles, or publications of other material that is made available to the public or is distributed through radio, television, cable television, or other methods of mass communication;
- 6.) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

## **Requests for Information**

- 7.) information provided in writing in response to a request by a covered executive or legislative branch official (the request may be oral or written);
- 8.) information required by subpoena, CID, or otherwise compelled by Congress or an agency (including information compelled by a contract, grant, loan, permit, or license);

## **Regulatory Activities**

- 9.) communications in response to a notice in the Federal Register and directed toward the official listed in the notice;
- 10.) communications that are made on the record in a public proceeding;
- 11.) written comments filed in the course of a public proceeding; and
- 12.) petitions for agency action made in writing and made part of the public record.

## **What is Lobbying Activity?**

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

## **Who is a Covered Official?**

Under the LDA, covered officials include certain members of the legislative and executive branches of the federal government. The definition of covered executive branch officials is narrower than that of covered legislative branch officials. Only the most senior executive branch employees and officials are considered “covered officials” for purposes of the LDA, whereas virtually every person working for Congress – from the receptionist to the Chief of Staff – is a covered official for purposes of the LDA.

- ***Covered Legislative Branch Official:*** A covered legislative branch official includes:
  - 1.) Members of Congress;
  - 2.) Elected officers of either the House or Senate;
  - 3.) Any employee, or any other individual functioning in the capacity of an employee, who works for a Member of Congress, a committee of either House of Congress, the leadership staff of either the House or Senate, a joint committee of Congress, or a working group or caucus organized to provide services to Members.
  
- ***Covered Executive Branch Official:*** A covered executive branch official includes:
  - 1.) The President;
  - 2.) The Vice-President;
  - 3.) Any member of the uniformed services serving at pay grade 0-7 (“one star”) or above;
  - 4.) Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
  - 5.) Any officer or employee in a position listed in levels I through V of the Executive Schedule (see 5 U.S.C. §§ 5312-5316 for listed positions); and,
  - 6.) Schedule C political appointees.

The “Executive Schedule” delineates the most senior positions in the administration, such as Cabinet secretaries, deputy secretaries, under secretaries, and assistant secretaries, as well as agency commissioners and directors. The appendix to this guide includes all of the positions in the Executive Schedule.

Schedule C posts are typically non-career policymaking or “political” appointees, and confidential secretaries and administrative assistants of key appointees within an agency. Not all agencies, however, use Schedule C posts for such appointees because the agency organic statute provides for such political appointments outside of Schedule C. For example, the FCC and the FTC have very few Schedule C appointees, even though there are political appointees and confidential assistants at those agencies. Such individuals are not, however, covered officials under the LDA because they are not Schedule C employees.

Senior Executive Service (“SES”) employees—senior career government officials—are not covered officials, unless they are on the Executive Schedule.

Under the LDA, an employee must say if he or she is a covered official if asked.

## How do I register?

If any individual within an organization meets the definition of “lobbyist,” then the organization must register by filing an LD-1 with the Clerk of the House and the Secretary of the Senate.

## How do I report?

Organizations that have filed an LD-1 must file an LD-2 report quarterly. This report is due 15 days after the close of the calendar quarter.

<u>Report Due</u>	<u>Period Covering</u>
April 15	January 1 to March 31
July 15	April 1 to June 30
October 15	July 1 to September 30
January 15	October 1 to December 31

In addition, each registrant, and each individual listed on the LD-1 or LD-2 as a lobbyist must file an LD-203 report every six months. This report discloses certain types of political contributions made by the registrant and lobbyist.

## Lobbying Costs

Note that even if a person is not listed as a lobbyist, his or her time is factored into the amount spent on lobbying activity.

## For more information:

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white paper

JANUARY 2012

# Forming an Association Political Action Committee

VENABLE LLP ON POLITICAL LAW

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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.<sup>1</sup>

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.

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<sup>1</sup> 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 "p acronym" 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.<sup>2</sup> 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

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<sup>2</sup> 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.

and their families;<sup>3</sup> (2) certain individual association members;<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup> 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.<sup>7</sup> 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.

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<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 11 C.F.R. § 114.8(c).

<sup>6</sup> *Id.* § 114.8(d)(4).

<sup>7</sup> 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.

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.

\* \* \*

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

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April 2012

### Communicating with Members after *Citizens United*

Related Topic Area(s): Lobbying and Political Activity, Tax and Employee Benefits

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

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

#### Overview of FEC Rules

##### *Restrictions and the changes brought by Citizens United*

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

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

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

##### *Your members may not be your members*

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

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

### **What can I do now?**

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

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

### **Considerations for Communications Beyond the Membership**

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

#### **1. Coordination**

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

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

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

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

#### **2. Disclaimers and Disclosure**

Communications that expressly advocate for or against a candidate must include a disclaimer stating



who paid for them; the payer's address, web address, or phone number; and that they are not authorized by a candidate. This is fairly simple for advertisements, but may be a little more complicated for articles in newsletters. Fortunately, Internet-based communications sent via email or posted to a website without a fee do not need disclaimers.

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

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

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

### **3. Tax Issues**

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

501(c)(4) and 501(c)(6) organizations may engage in political activity, but not if the political activity comprises the organization's "primary activity." The IRS has announced plans to increase scrutiny of 501(c)(6) and 501(c)(4) political activity, so care must be taken.

Finally, permissible nonprofit association political speech may also trigger a 35 percent proxy tax on the total communication cost (or on net investment income for the organization, whichever is lower). And business corporations cannot deduct the cost of their lobbying or election-related activities on their income tax returns as business expenses.

### **4. Super PACs**

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

\* \* \*

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

\* \* \*

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can be provided only in response to specific fact situations.



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Venable LLP partners [Ronald M. Jacobs](#) and [D. E. Wilson, Jr.](#) [submitted Comments](#) critical of the U.S. Office of Government Ethics’ (“OGE”) notice of proposed rulemaking (“NPRM”) to expand the executive branch gift rule. The gift rule traditionally has permitted federal employees to accept certain gifts from the private sector, such as attendance and meals at “widely attended gatherings” or *de minimus* gifts worth less than \$20. President Obama changed this rule in 2009 by Executive Order, requiring as a contractual term of employment, all political appointees in his Administration to sign an Ethics Pledge that bans gifts from lobbyists. Now, OGE proposes to codify the political appointee lobbyist gift ban in its regulations and expand it to cover all 2.8 million federal employees.

Mr. Jacobs and Mr. Wilson urged OGE to review the constitutionality of its proposal, and suggest that OGE use this opportunity to harmonize the gift rules across the government in an understandable manner. The current rule is dense, long and confusing. Adding a new layer of restriction will make it worse.

OGE recognized that brazen *quid pro quo* gifts from lobbyists are not a problem. Instead, its NPRM seeks to limit lobbyists’ access to federal personnel by barring federal personnel from accepting invitations to most events sponsored by a federal lobbyist or an organization that employs one or more federal lobbyists. OGE proposes to exempt media organizations and certain nonprofits—but not 501(c)(6) trade associations or 501(c)(4) social welfare organizations—from this lobbyist gift ban.

Venable’s Comments challenged OGE’s assumptions. While supportive of exempting media organizations and select nonprofits, Venable urged OGE to exempt other nonprofits and businesses, too. OGE chose to exempt media organizations from the lobbyist gift ban because the First Amendment guarantees a free press. But OGE neglected to read the rest of the First Amendment, which also guarantees the right to petition the government for redress of grievances, or “lobbying.” This suspect classification cannot stand. Likewise, the tax law limit on 501(c)(3) lobbying applies to only some 501(c)(3) organizations. Other taxes and rules limiting for-profits’ deduction of lobbying expenses from their taxable incomes provide equivalent inhibitions. And the federal ban on using federal funds to lobby for more federal funds applies to all individuals and organizations, not just charities. Venable, and other commenters as well, demonstrate that other nonprofits and businesses also provide value to federal agencies by inviting federal personnel to trade

shows, plant visits and other events, contrary to OGE's conclusions.

Mr. Jacobs and Mr. Wilson demonstrated how easily lobbyists may evade the proposed lobbyist gift ban. Many federal lobbyists will simply de-register. Others will provide gifts through affiliated entities that are not registered or are 501(c)(3) organizations, such as a lobbying firm's tax-exempt foundation. These organizations either fall outside the class of defined "registered lobbyists or lobbying organizations," or are exempt despite being registered. In any event, decreased transparency in lobbying and gift-giving will result if the NPRM is adopted as proposed. The current system is complex and cumbersome, but the new rules will both fail to achieve the government's stated purpose and remove substantial lobbyist-government interaction from the public record.

To avoid these problems, Mr. Jacobs and Mr. Wilson proposed taking this opportunity to conform the executive branch gift rules to those adopted by Congress, including its lobbyist gift ban. Congressional gift rules are clearer and give donors and recipients greater assurance.

OGE has extended its comment period to December 14, 2011. Its NPRM and the comments filed to date are available at: <http://www.usoge.gov/Laws-and-Regulations/Federal-Register-Issuances/Proposed-Rules-and-Comments/Proposed-Lobbyist-Gift-Ban-Rule/>.

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# InsideCounsel

## Regulatory: It's a bird, it's a plane, no, it's a super PAC!

A look at the inner workings of the political committees

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BY RONALD JACOBS  
March 28, 2012 • Reprints

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The big story for the 2012 elections has been the rise of super PACs, or, independent expenditure committees. How did we get super PACs, what do they do, what can they do and what are the legal restrictions on them?

### The legal underpinnings

There are two underlying issues involved in super PACs:

1. The use of corporate funds for independent expenditures
2. The fundraising restrictions imposed on political committees

**Corporate independent expenditure:** Since *Buckley v. Valeo* in 1976, the Supreme Court has recognized that there is a difference between a contribution given to a candidate and a person's own expenditures supporting a candidate. The former receives less protection under the First Amendment and may be limited; the latter may not be limited because it is direct speech by an individual. Even with these First Amendment protections, the Federal Election Campaign Act (FECA) prohibits corporations from making independent expenditures.

Under the Supreme Court's jurisprudence, the only justification for campaign finance regulation is preventing corruption or the appearance of corruption. In *Citizens United*, the Supreme Court categorically held that independent expenditures cannot corrupt a candidate because they are made independently of the candidate. Therefore, the court struck down the ban on corporate independent expenditures.

**Political committees:** The Federal Election Commission (FEC) has taken a broad view of the definition of "political committee." Therefore, even when making independent expenditures, individuals could not band together to pay for them because they would be considered a political committee. A political committee is subject to contribution limits of \$5,000 per year. Thus, one

person could spend an unlimited amount on independent expenditures, and so could a second person. If, however, they pooled their resources and worked together, they would be considered a political committee and the amount they could each contribute to the effort would be limited.

Following *Citizens United*, in *SpeechNow.org v. FEC*, the D. C. Circuit held that a political committee that just makes independent expenditures (and not contributions) may not be subject to the \$5,000 contribution limit. In Advisory Opinion 2010-11, the FEC recognized that with *Citizens United* and *SpeechNow.org*, it could not limit the contributions given to independent expenditure committees and the super PAC was born.

### **What is a super PAC and how does it work?**

A super PAC is a political committee registered with the FEC. As such, it must file periodic reports disclosing its donors and its expenditures. It may accept unlimited contributions from individuals, labor unions and corporations.

**Disclosure:** Because a super PAC may accept corporate contributions, it may accept those contributions from non-profit organizations, such as a 501(c)(6) trade association or a 501(c)(4) social welfare organization. The non-profit is disclosed as the contributor to the super PAC. Therefore, there is some concern that donors that do not wish to be disclosed—whether they are corporations or individuals—may give to non-profits, which then give to the super PAC. There are limits on how much of a non-profit's resources may be used for campaign activity, such as contributing to a super PAC.

**Independent expenditures:** A super PAC may spend its funds on independent expenditures. This is any kind of communication that expressly advocates the election or defeat of a clearly identified candidate for federal office (there are also state super PACs, which register with state elections agencies and support state or local candidates). Such communications may include television and radio advertisements, email, websites, social media, direct mail and telephone calls. Depending on the mode of communication, the message will require a disclaimer stating the name and website (or address) of the organization and a statement that it is not authorized by any candidate.

When a super PAC makes independent expenditures to support or oppose a candidate, it must file reports with the FEC disclosing the expenditures. Depending on how far before the election the communications are made, the reports are filed either 24 or 48 hours after the communications are publicly disseminated.

**No coordination:** The key to a super PAC is that it must conduct its activities independently from the candidates it supports. Thus, it may not make “coordinated communications.” The FEC has struggled with this definition over the years. In general, a communication is considered to be coordinated if:

- The communication is made at the request or suggestion of the candidate or his agent
- The candidate or her agent assents to a suggestion by the super PAC for a communication
- The candidate or his agent is materially involved with decisions concerning the content, audience, means, frequency, media outlet or similar information
- There is substantial discussion about the candidate’s plans, projects, activities or needs

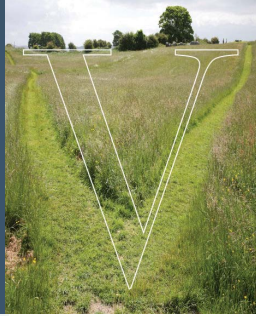
In addition, communications are considered to be coordinated if vendors or employees of the campaign use material, non-public information about the campaign to produce a communication within 120 days. That is, there is generally a four-month cooling off period when employees or vendors move from the campaign to a super PAC (although it is certainly possible that a vendor or employee has no material non-public information, particularly if the campaign releases information to the media).

Thus, there are many different types of activities—particularly when information is publicly available—that are permitted without running afoul of the coordination regulations.

**Fundraising:** Candidates are allowed to raise money for super PACs. However, they may not ask for more than \$2,500 per election. Thus, if a candidate is involved in fundraising, he or she will usually ask for contributions without an amount and representatives of the super PAC will ask for amounts over \$2,500.

## **Conclusion**

To date, there have not been many contributions to super PACs from publicly traded companies and some have adopted policies against giving to super PACs. There have been contributions from 501(c)(4)s and 501(c)(6)s, so some of the money may have gone through those organizations. There have been direct contributions by privately held companies, but most of the contributions have been from individuals.



SUMMER, 2011

## ISSUES TO CONSIDER

Efficacy & Ethics

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Disclosure

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Tax

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

## EFFICACY & ETHICS OF GRASSROOTS TECHNIQUES

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

### Will officials view the communications from constituents as legitimately driven?

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

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

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

## Are the communications real?

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

Your organization should take the following steps to prevent fraud:

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



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

### Is your message fair and truthful?

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

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

## DISCLOSURE OF GRASSROOTS ACTIVITY

### Federal and state lobbying disclosure

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

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

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

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

## Tax issues

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

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

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

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

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

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

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

## CAMPAIGN FINANCE CONSIDERATIONS

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

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

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

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

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

## ADVERTISING LAW ISSUES

### Television & Radio

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

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

## Email

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

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

## Phone

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

## CONCLUSION

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

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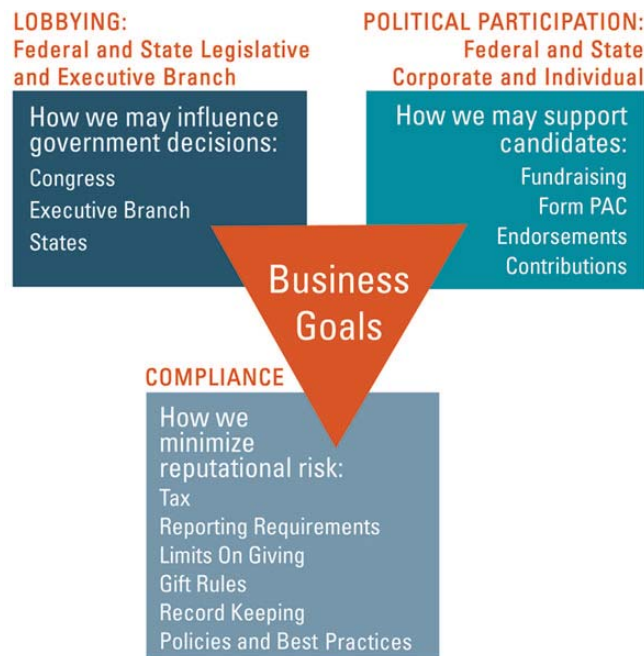
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## POLITICAL LAW

successfully navigating your interaction with the government

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

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



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

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

**How can we help you?** To find out, please contact us at 1.888.VENABLE or [www.Venable.com](http://www.Venable.com)