A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

BY STEVEN H. SHOLK, ESQ.

STEVEN H. SHOLK, ESQ.
GIBBONS P.C.
ONE GATEWAY CENTER
NEWARK, NEW JERSEY 07102-5310
(973) 596-4639
ssholk@gibbonslaw.com

ONE PENNSYLVANIA PLAZA
37th FLOOR
NEW YORK, NEW YORK 10119-3701
(212) 613-2000

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	1. A corporation cannot make a contribution or expenditure in connection with any federal election from corporate treasury funds. 2 U.S.C. §441b(a); 11 C.F.R. §114.2(b). Under Citizens United (discussed in Paragraphs 10 and 11 below), the statutory prohibition on independent expenditures by corporations is unconstitutional under the First Amendment. An independent expenditure "means an expenditure by a person–(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party or its agents." 2 U.S.C. §431(17). 2. A contribution or expenditure does not include the establishment, administration, and solicitation of contributions to a separate segregated fund, otherwise known as a political action committee ("PAC"). 2 U.S.C. §441b(b)(2)(C); 11 C.F.R. §§114.1(a)(2)(iii) and (b) and 114.5(b). 3. An expenditure does not include nonpartisan activity designed to encourage individuals to vote or register to vote. 2 U.S.C. §431(9)(B)(ii). Nonpartisan means that no effort is made to determine the party or candidate preference of individuals before encouraging them to vote or register to vote. 11 C.F.R. §100.133. Under Citizens United, discussed in Paragraphs 10 and 11 below, corporations are no longer	1. Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), defines a Section 501(c)(3) organization in pertinent part as an organization "no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection [501](h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. §501(c)(3). 2. There is no insubstantiality exception to the Code's prohibition against campaign intervention. Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989); United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981); H.R. Rep. No. 91-413, 91st Cong., 1st Sess. 31-32 (1969), reprinted in 1969 U.S. Code Cong. & Admin. News 1645, 1676-1680; S. Rep. No. 91-552, 91st Cong., 1st Sess. 47 (1969), reprinted in 1969 U.S. Code Cong. & Admin. News 2027, 2074-79; IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 7 (Nov. 2013). 3. The Section 501(c)(3) prohibition against campaign intervention has been upheld against First Amendment attack. Branch Ministries, Inc. v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000); Christian Echoes National Ministry, Inc. v. United

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	limited to nonpartisan activity. 4. (a) A corporation cannot use corporate treasury funds for electioneering communications. 2 U.S.C. §441b(b)(2) and (c). The Supreme Court virtually gutted this prohibition in Wisconsin Right to Life (discussed in Paragraph 9 below) and Citizens United (discussed in Paragraphs 10 and 11 below). An electioneering communication means any broadcast, cable, or satellite communication that: (i) refers to a clearly identified candidate for federal office. There is no requirement that the communication support or oppose any candidate. Thus, electioneering communications can include issue advertisements and grassroots lobbying; (ii) is made within sixty days of a general, special, or run-off election, or within thirty (30) days of a primary election ("Covered Period"); and (iii) is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i); 11 C.F.R. §100.29. A primary election includes any caucus or convention of a political party that has the authority to nominate a candidate for federal office. 11 C.F.R. §100.29(a)(2). (b) A communication is targeted if it can be received by 50,000 or more persons in the congressional district for a House candidate or in the state for a Senate candidate. 2 U.S.C. §434(f)(3)(C); 11 C.F.R. §100.29(a)(5). FECA does not expressly require a communication to be targeted for a Presidential election. The regulations provide that a communication that refers to a clearly identified candidate for his or her party's nomination for President or Vice	States, 470 F.2d 849, 856-57 (10th Cir. 1972) ("In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive Christian Echoes of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption."), cert. denied, 414 U.S. 864 (1973). 4. A private foundation cannot pay or incur any amount "to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive." I.R.C. §4945(d)(2). 5. A private foundation can make certain grants to other private foundations and public charities for nonpartisan activity. See discussion of the grant requirements in Paragraphs 7 to 11 of the I.R.C. column for "Voter Registration And Get-Out-The-Vote Drives."

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	President must be publicly distributed within thirty days before a primary election in such a way that the communication can be received by 50,000 or more persons within the state holding the primary election, or publicly distributed between thirty (30) days before the first day of the nominating convention and its conclusion in such a way that the communication can be received by 50,000 or more persons anywhere in the United States. 11 C.F.R. §100.29(a)(3)(ii). The Federal Communications Commission provides a database on its Website at http://gullfoss2.fcc.gov/ecd/ for determining whether a communication can be received by 50,000 or more persons. (c) The term "clearly identified" means that (i) the name of the candidate involved appears; (ii) a photo or drawing of the candidate appears; or (iii) the identity of the candidate is apparent by unambiguous reference. 2 U.S.C. §431(18). The regulations provide that "clearly identified" means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee," or "the Republican candidate for Senate in the State of Georgia." 11 C.F.R. §100.29(b)(2). "Clearly identified" also includes a reference to a popular name of legislation identified by the sponsor's name. 67 F.R. 65,190, 65,200-201 (Oct. 23, 2002). For example, a reference to the Sarbanes-Oxley Act of 2002	

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	made on television or radio during the Covered Period is an electioneering communication. (d) An electioneering communication does not include any communication that is publicly disseminated over the Internet, or in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and mailings. 11 C.F.R. §100.29(c)(1). 5. The prohibition against using corporate treasury funds for electioneering communications does not allow a Section 501(c)(3) organization to engage in political activity that is not an electioneering communication, but is otherwise prohibited under the Internal Revenue Code. 2 U.S.C. §§434(f)(7) and 441b(c)(5). 6. FECA generally applies only to campaigns for federal office, which is defined as "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 2 U.S.C. §431(3). In addition, candidates in nonfederal elections who are also federal officeholders or candidates for federal office are generally subject to FECA. 2 U.S.C. §441i(e)(1)-(2); 11 C.F.R. §§300.60 to 65; FEC Advisory Opinion No. 2005-2 ("Senator Corzine and his agents may raise funds for the campaigns of the other New Jersey State and local candidates, State PACs, and the non-federal accounts of State and local party committees <u>only</u> in amounts that are not in excess of 2 U.S.C. 441a(a) and from sources that are	

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	permissible under the limitations and prohibitions of the Act;" "[S]ection 441i(e)(2) provides that the restrictions of 2 U.S.C. 441i(e)(1)(B) do not apply to the solicitation, receipt, or spending of funds by a Federal officeholder who is also a candidate for a State or local office solely in connection with such election, if the solicitation, receipt, or spending of funds is permitted under State law and refers only to the Federal officeholder who is also a State or local candidate, and/or to his opponents."). McCONNELL, WISCONSIN RIGHT TO LIFE, AND CITIZENS UNITED 7. The United States Supreme Court initially upheld FECA's electioneering communication provisions against First Amendment attack in McConnell v. FEC, 124 S. Ct. 619, 688-89 (2003): Thus, a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provision in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line. Nor did we suggest as much in MCFL, 479 U.S. 238 (1986), in which we addressed the scope of another FECA expenditure limitation and confirmed the understanding that	

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	Buckley's express advocacy category was a product of statutory construction. In short, the concept of express advocacy and the concomitant class of magic words [vote for, elect, support, defeat, and reject] were born of an effort to avoid constitutional infirmities. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (citing Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804)). We have long "rigidly adhered" to the tenet "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," United States v. Raines, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us to consider the case that is actually before us," James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting). Consistent with that principle, our decisions in Buckley and MCFL were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech. Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. See Buckley, supra, at 45. Indeed, the unmistakable lesson from	

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	the record in this litigation, as all three judges on the District Court agreed, is that Buckley's magic-words requirement is functionally meaningless. 251 F. Supp. 2d, at 303-304 (Henderson, J.); id., at 534 (Kollar-Kotelly, J.); id. at 875-879 (Leon, J.). Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. Buckley's express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system. Finally we observe that new FECA §304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in Buckley. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable. See Grayned v. City of Rockford, 408 U.S. 104, 108-114 (1972). Thus, the constitutional objection that persuaded the Court in Buckley to limit FECA's reach to express advocacy is simply inapposite here. [footnotes omitted] 8. It is important to note that in a dissenting opinion in	

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	McConnell written by Justice Kennedy, three dissenters, Chief Justice Rehnquist and Justices Kennedy and Scalia, were critical of Buckley: "The Government and the majority are right about one thing: The express-advocacy requirement, with its list of magic words, is easy to circumvent." 124 S. Ct. at 762. The dissenters then rejected the prohibition on the use of corporate treasury funds for electioneering communications not because of Buckley's distinction between express advocacy and issue advocacy, but because it unlawfully impinged on First Amendment rights. 9. (a) In FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007), the United States Supreme Court held that application of the electioneering prohibition to three broadcast advertisements that Wisconsin Right to Life, a Section 501(c)(4) organization, proposed to run in 2004 violated that organization's First Amendment right to engage in grassroots lobbying and issue advocacy. The advertisements urged Wisconsin voters to contact their Senators, Russell Feingold and Herb Kohl, and request that they oppose efforts to filibuster President Bush's federal judicial nominees. The advertisements also contained the following language in a voice-over: "Sometimes it's just not fair to delay an important decision. But in, Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency." Since Senator Feingold was	

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	a candidate in the September 3, 2004 primary, the ads triggered the electioneering prohibition during the thirty days prior to the primary. (b) In the Court's principal opinion by Chief Justice Roberts, joined in by Justice Alito, the Court held that for as applied challenges to FECA's electioneering prohibition, the prohibition is enforceable under the First Amendment only with respect to ads that are express advocacy or the functional equivalent of express advocacy. An ad is the functional equivalent of express advocacy only if the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. In applying this test, a court uses the following guidelines: (i) the inquiry must be objective, focusing on the substance of the communication, rather than amorphous considerations of intent and effect; (ii) contextual factors should rarely play a significant role in the inquiry; (iii) since the government has the burden of justifying restrictions on political speech, the speaker gets the benefit of any doubt; and (iv) if an ad may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, then the ad is not the functional equivalent of express advocacy. More specifically, a court considers whether the ads "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." 127 S. Ct. at 2667.	

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	(c) The Court found that the advertisements did not meet this test. First, the advertisements focused on the legislative issue of filibustering Senate votes on judicial nominees. They took a position on this issue, exhorted the public to adopt that portion, and urged the public to contact public officials with respect to the matter. Second, the advertisements did "not mention an election, candidacy, political party, or challenger." Id. at 2667. Third, the advertisements did not "take a position on a candidate's character, qualifications, or fitness for office." Id. (d) In an opinion concurring in the judgment, Justice Scalia, joined in by Justices Kennedy and Thomas, wrote that the First Amendment requires clear tests for distinguishing express advocacy from issue advocacy, and clear tests that protected all issue ads would "cover such a substantial number of ads prohibited by §203 [of the Bipartisan Campaign Reform Act of 2002] that §203 would be rendered substantially overbroad." 127 S. Ct. at 2683. The only way to constitutionally separate express advocacy from issue advocacy would be to overrule McConnell and reinstitute the "magic words" test of Buckley. Id. at 2684. (e) In a dissenting opinion, Justice Souter, joined in by Justices Stevens, Ginsburg, and Breyer, wrote that the ads were analogous to the ads upheld in McConnell, ads that attacked a candidate's record before urging viewers to call the candidate. 127 S. Ct. at 2698-99. Furthermore, separating an ad from its context before determining whether	

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	a reasonable person would view it as an appeal to vote for or against a candidate not only resurrected Buckley's "magic words" test, but also enabled some ads that used the "magic words" to escape regulation. Finally, the principal opinion improperly treated §203 as a speech ban rather than a limitation on corporate funding. Corporations were free to speak through their PACs, and had Wisconsin Right to Life not used corporate contributions to pay for its ads, it could have ran the ads free of §203's limitations. (f) See discussion of the distinction between permissible issue advocacy and impermissible campaign intervention under Code Section 501(c)(3) in Paragraphs 9 to 13 of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering." 10. (a) In Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), the United States Supreme Court held that corporations have a First Amendment right to make independent expenditures for express advocacy communications. The Court struck down as unconstitutional the prohibition under 2 U.S.C. §441b on corporations from using their general treasury funds to make independent expenditures, and the prohibition under 2 U.S.C. §441b on corporations from using their general treasury funds for electioneering communications or speech expressly advocating the election or defeat of a candidate. The Court also overruled Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and McConnell v. Federal Election	

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	Commission, 540 U.S. 93, 203-209 (2003), insofar as Austin held that political speech may be banned based on the speaker's corporate identity, and McConnell upheld the prohibition on electioneering communications. (b) The Court's opinion was delivered by Justice Kennedy, and Justices Roberts, Scalia, Alito, and Thomas joined in the opinion. Justice Stevens dissented, and Justices Ginsburg, Breyer, and Sotomayor joined the dissent. (c) Citizens United, a Virginia-based nonprofit corporation, produced Hillary: The Movie, a ninety-minute movie about the candidate for the Democratic nomination for President, Senator Hillary Rodham Clinton. The movie focused on Senator Clinton's Senate record and her White House record during President William Clinton's term. The movie contained express opinions of whether she would make a good President, but did not expressly advocate her election or defeat. The movie called Senator Clinton "dishonest," "Machiavellian," and "willing to do anything for power." Citizens United released the movie for sale on DVD on January 7, 2008. Citizens United planned to run three TV ads to promote the movie in January 2008, and also planned to market the movie via video-on-demand cable TV. If Citizens United ran the ads on TV, or broadcast the movie on a video-on-demand channel, it risked violating the prohibition on corporate-funded electioneering communications during a primary.	

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	(d) The standard of judicial review under Wisconsin Right to Life for laws that restrict political speech is strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest, and is narrowly tailored to achieve that interest. (e) The Court held that the First Amendment protects speech, rather than the individual or corporate identity of the speaker: Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, e.g., United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content. Quite apart from the purpose of effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of	

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	the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protect speech and speaker, and the ideas that flow from each. [130 S. Ct. at 898-99]. (f) The Court rejected the antidistortion rationale of Austin and the need to protect the public from corporate speech: It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." Id. at 660 [Austin, 494 U.S. at 660] (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas. See id., at 707 (Kennedy, J., dissenting) ("Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary."). [130 S. Ct. at 905]. . . . . Austin interferes with the "open marketplace" of ideas protected by the First Amendment. New York State Bd. Of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008); see ibid. (ideas "may compete" in this marketplace "without government interference."); McConnell, supra, at 274 (opinion of Thomas, J.). It permits the Government to ban	

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	the political speech of millions of associations of citizens. See Statistics of Income 2 (5.8 million for-profit corporation filed 2006 tax returns). Most of these are small corporations without large amounts of wealth. See Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 1, 3 (96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees); M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, see 26 U.S.C. §301, have less than $1 million in receipts per year). This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." Austin, 494 U.S. at 660. It is not even aimed at amassed wealth. [130 S. Ct. at 906-07]. (g) The Court also found the need to prevent corruption insufficient to justify the prohibition on independent expenditures by corporations: With regard to large direct contributions, Buckley reasoned that they could be given "to secure a political *quid pro quo*," id., at 26 [424 U.S. at 26] and that "the scope of such pernicious practices can never be reliably ascertained," id., at 27. The practices Buckley noted would be covered by bribery laws, see, e.g., 18 U.S.C. §201, if a *quid pro quo* arrangement were proved. See Buckley, supra, at 27, and n.	

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	28 (citing Buckley v. Valeo, 519 F. 2d 821, 839-840, and nn. 36-38 (CADC 1975) (en banc) *per curiam*)). The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. MCFL, 479 U.S., at 260; NCPAC, 470 U.S., at 500; Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 210 (1982) (NRWC).The Buckley Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." Buckley, 424 U.S., at 47; see ibid. (independent expenditures have a "substantially diminished potential for abuse."). Limits on independent expenditures, such as §441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States. See Supp. Brief for Appellee 18, n.3; Supp. Brief for Chamber of	

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	Commerce of the United States of America as *Amicus Curiae* 8-9, n.5 [130 S. Ct. at 908] (h) Finally, the Court rejected the FEC's two-part, eleven factor balancing test for determining express advocacy. Such a test functioned as an unlawful prior restraint of First Amendment rights. 130 S. Ct. at 895-96. 11. (a) The dissent in Citizens United argued that the identity of corporations makes a critical difference in the First Amendment analysis: [I]t is the identity of corporations, rather than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. NRWC, 459 U.S., at 209-210.[50] Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information," Beaumont, 539 U.S., at 161, n.8 (citation omitted). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental	

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	interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism. [130 S. Ct. at 947] [50] They are likewise entitled to regulate media corporations differently from other corporations "to ensure that the law 'does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.'" McConnell, 540 U.S., at 208 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 668 (1990)). (b) The dissent relied on protecting the integrity of the marketplace of ideas from the potential distortion caused corporate expenditures as sufficient justification for the prohibition on corporate expenditures: [I]n Austin, 494 U.S. 652, we considered whether corporations falling outside the MCFL exception could be barred from using general treasure funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of "the integrity of the marketplace of political ideas" in candidate elections, MCFL, 479 U.S., at 257, we noted that corporations have "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U.S., at 658-569—that allow them to spend prodigious	

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	general treasury sums on campaign messages that have "little or no correlation" with the beliefs held by actual persons, id., at 660. In light of the corrupting effects such spending might have on the political process, ibid., we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations' PACs, which rely on voluntary contributions and thus "reflect actual public support for the political ideals espoused by corporations," ibid. Notwithstanding our colleagues' insinuations that Austin deprived the public of general "ideas," "facts," and "knowledge," ante, at 38-29, the decision addressed only candidate-focused expenditures and gave the State no license to regulate corporate spending on other matters. [130 S. Ct. at 956]. (c) The dissent also relied on maintaining the trust of the public in the democratic process: Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues … on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"—or expenditures—"valued by the officeholder." McConnell, 540 U.S., at 153.[63] When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from	

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	what is pure or correct" in the conduct of Government, Webster's Third New International Dictionary 512 (1966) (defining "corruption"), that it amounts to a "subversion… of the electoral process," Automobile Workers, 352 U.S., at 575. At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves," WRTL, 551 U.S., at 507 (Souter, J., dissenting). "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" McConnell, 540 U.S., at 144 (quoting Shrink Missouri, 528 U.S., at 390).[64] [63] Cf. Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 398 (2000) (recognizing "the broader threat from politicians too compliant with the wishes of large contributors"). Though discrete in scope, these experiments must impose some meaningful limits if they are to have a chance at functioning effectively and preserving the public's trust. "Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." McConnell, 540 U.S., at 153. There should be nothing controversial about the proposition that the influence being targeted is "undue." In a	

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	democracy, officeholders should not make public decisions with the aim of placating a financial benefactor, expect to the extent that the benefactors is seen as representative of a larger constituency or its arguments are seen as especially persuasive. [64] The majority declares by fiat that the appearance of undue influence by high-spending corporations "will not cause the electorate to lose faith in our democracy." Ante, at 44. The electorate itself has consistently indicated otherwise, both in opinion polls, see McConnell v. FEC, 251 F. Supp. 2d 176, 557-558, 623-624 (DC 2003) (opinion of Kollar-Kotelly, J.), and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law. [130 S. Ct. at 962-63] (d) In an 8-1 decision, the Court upheld the disclosure provisions of 2 U.S.C. §434(f)(1)-(2), which require any person who spends more than $10,000 on electioneering communications in a calendar year to file a disclosure statement with the FEC. The statement must: (i) identify the person making the expenditure; (ii) the custodian of the books and accounts of the person making the expenditure; (iii) the amount of each expenditure of more than $200 during the period covered by the statement and the identification of the person to whom the expenditure was made; (iv) the elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified; and (v) if the	

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	expenditures were paid out of a segregated bank account that consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. (e) The person must file the statement within twenty-four hours after each disclosure date. 2 U.S.C. §434(f)(1). "Disclosure date" means (i) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating more than $10,000; and (ii) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year. 2 U.S.C. §434(f)(4). (f) The test of constitutionality of disclosure requirements is that there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest. 130 S. Ct. at 914. A sufficiently important governmental interest is providing the electorate with information about the sources of election-related spending so that voters can make informed decisions, and	

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	give proper weight to different speakers and messages. The disclosure requirement satisfied this test. The Court also rejected the argument that under the First Amendment FECA's disclosure requirements must be limited to express advocacy or the functional equivalent of express advocacy. 130 S. Ct. at 915-16. (g) While the disclosure requirements may burden the ability to speak, they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. Finally, as the argument that disclosure requirements could deter contributions because contributors may fear retaliation, the Court held that the disclosure requirements would be unconstitutional as applied to an organization when there is a reasonable probability that its contributors would be subject to harassment, reprisals, or threats. 130 S. Ct. at 916; National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 462-63 (1958). THE PROGENY OF WISCONSIN RIGHT TO LIFE AND CITIZENS UNITED WITH RESPECT TO CONTRIBUTIONS AND INDEPENDENT EXPENDITURES 12. (a) In SpeechNow.org v. Federal Election Commission, 599 F.3d 686 (D.C. Cir. 2010) (en banc), cert. denied, 131 S. Ct. 553 (2010), the court, relying on Citizens United, held that individuals may make unlimited contributions to an unincorporated nonprofit association registered as a political organization under Section 527 of the Internal Revenue	

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	Code, and that operated exclusively through independent expenditures: "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" 599 F.3d at 694-95. Accordingly, the contribution limits of 2 U.S.C. §§441a(a)(1)(C) and 441a(a)(3) were unconstitutional as applied to individuals' contributions to an independent expenditure group. See also American Tradition Partnership, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (per curiam) (Court struck down Montana statute that prohibited corporations from making expenditures in connection with a candidate or a political committee that supports or opposes a candidate or political party); Wisconsin Right to Life, Inc. v. Barland, 2014 U.S. App. LEXIS 9015 (7th Cir. 2014) (court struck down statutory prohibition on independent expenditures by corporations, and cap on amount that corporations may spend to solicit contributions to an affiliated independent-expenditure PAC); Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013) (court upheld preliminary injunction against enforcement of New Mexico statute that capped contributions from individuals to political committees that are not formally affiliated with a political party or candidate at $5,000 as applied to the solicitation and acceptance of contributions for independent expenditures); New York Progress & Protection PAC v. Walsh, 733 F.3d	

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	483 (2d Cir. 2013) (court granted preliminary injunction against enforcement of aggregate limit under New York statute on an individual's contributions to groups for independent expenditures); Texans for Free Enterprise v. Texas Ethics Commission, 732 F.3d 535 (5th Cir. 2013) (court upheld preliminary injunction against enforcement of Texas statute that prohibited corporate contributions to general purpose political committees that used funds only for direct campaign expenditures for political speech that was independent of candidates and parties); Farris v. Seabrook, 677 F.3d 858 (9th Cir. 2012) (no state interest in limiting contributions to independent recall committees at $800); Wisconsin Right to Life State Political Action Committee v. Barland, 664 F.3d 139 (7th Cir. 2011) (application of statute that limited the amount individuals may contribute to state and local candidates, political parties, and political committees to $10,000 in any calendar year to organizations engaged only in independent expenditures prohibited under Citizens United); Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011) (court upheld preliminary injunction against enforcement of ordinance that made it unlawful for independent committees that do not coordinate with candidates to use a contribution to support or oppose a candidate unless the contribution is attributable to an individual and does not exceed $500 per candidate per election); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010) (court struck down ordinance that provided that any person who makes independent expenditures supporting or opposing a candidate	

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	shall not accept any contribution in excess of $350 to $650, depending on the office for which the candidate is running); EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009) (since contributions to and spending by a nonprofit independent expenditure organization do not corrupt a candidate or officeholder, federal regulatory limits on contributions to these organizations are unconstitutional); The Fund for Louisiana's Future v. Louisiana Board of Ethics, 2014 U.S. Dist. LEXIS 61381 (E.D. La. 2014) (court enjoined application of Louisiana's statutory limitation on contributions to political committees of $100,000 every four years to an independent expenditure-only committee); New York Progress & Protection PAC v. Walsh, 2014 U.S. Dist. LEXIS 57477, at *10 (S.D.N.Y. 2014) ("[T]he Court holds that the limitations contained in New York Election Laws §§14-114(8) and 14-126, as applied to independent expenditure-only organizations, cannot prevent quid pro quo corruption or its appearance, and thus violate the First Amendment."); Personal PAC v. McGuffage, 858 F. Supp. 2d 963 (N.D. Ill. 2012) (court enjoined enforcement of statutory contribution limits as applied to contributions to independent expenditure only PACs, and the statutory prohibition against the establishment or maintenance of more than one PAC as applied to the establishment or maintenance of independent expenditure only PACs); Thalheimer v. City of San Diego, 2012 U.S. Dist. LEXIS 6563 (S.D. Cal. 2012) (ordinance made it unlawful for any general purpose recipient committee to use a contribution for the purpose of supporting or opposing a candidate unless the contribution is	

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	attributable to an individual in an amount that does not exceed $500 per candidate per election; court struck down ordinance as it applies to contributions to independent expenditure committees regardless of whether independent expenditures are the only expenditures that those committees make; to prevent circumvention of contribution limits by individual donors, when a committee that otherwise makes independent expenditures decides to make contributions to a candidate or party, the City may enforce the $500 contribution limit); FEC Advisory Opinion No. 2012-3 (nonconnected political committee may solicit through its Website and forward unlimited contributions earmarked for nonconnected political committees that make only independent expenditures or earmarked for a nonconnected political committee's noncontribution account used to finance independent expenditures; committee will deposit contributions earmarked for these purposes into a bank account separate from its account that contains contributions earmarked for federal candidates); FEC Advisory Opinion No. 2010-11 (nonconnected political committee may solicit and accept unlimited contributions from corporations, individuals, labor organizations, and political committees for the purpose of making independent expenditures); FEC Advisory Opinion No. 2010-9 (nonprofit social welfare organization exempt from tax under Code Section 501(c)(4) established committee that will make only independent expenditures; committee can solicit and accept unlimited contributions from the general public, and unlimited contributions earmarked for specific independent	

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	expenditures; sponsoring organization's payment of establishment, administrative, and solicitation expenses constitute represent contributions from the sponsoring organization to the committee). (b) The court in SpeechNow.org upheld the registration and reporting requirements of 2 U.S.C. §§431(4) and (8), 432, 433, and 434(a) for a political committee that exclusively makes independent expenditures. Under these statutory provisions, a political committee must: appoint a treasurer, §432(a); maintain a separately designated bank account, §432(b), 432(h); keep records for three years that include the name and address of any person who makes a contribution in excess of $50, §432(c)(1)-(2), 432(d); keep records for three years that include the date, amount, and purpose of any disbursement and the name and address of the recipient, §432(c)(5), 432(d); register with the FEC within ten days of becoming a political committee, §433(a); file with the FEC quarterly or monthly reports during the calendar year of a general election detailing cash on hand, total contributions, the identification of each person who contributes an annual aggregate amount of more than $200, independent expenditures, donations to other political committees, any other disbursements, and any outstanding debts or obligations, §434(a)(4), 434(b); file a pre-election report and a post-election report detailing the same, id.; file semiannual or monthly reports with the same information during years without a general election, id.; and file a written statement to	

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	terminate the committee, §433(d). (c) The registration and reporting requirements served the governmental interest in providing the electorate with information about the sources of political campaign funds. Furthermore, disclosure requirements impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. 13. (a) In FEC Advisory Opinion No. 2011-12, the FEC addressed the permissible scope of solicitation by federal officeholders and candidates, and officers of national party committees, on behalf of independent expenditure only political committees. (b) Federal officeholders and candidates, and officers of national party committees, cannot solicit unlimited contributions from individuals, corporations, or labor organizations on behalf of independent expenditure only political committees. (c) Federal officeholders and candidates, and officers of national party committees, may solicit up to $5,000 from individuals (other than foreign nationals and federal contractors), and any other source not prohibited by FECA from making a contribution to a political committee, on behalf of independent expenditure only political committees. (d) Federal officeholders and candidates cannot raise or spend funds in connection with an election for federal office	

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	unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. §441i(e)(1)(A); 11 C.F.R. §300.61. Persons subject to Section 441i(e) also may not raise or spend funds in connection with any election other than an election for federal office unless the funds are raised within FECA's contribution limits, and are not from prohibited sources. 2 U.S.C. §441i(e)(1)(B); 11 C.F.R. §300.62. Similarly, national parties and their officers and agents, or a national congressional campaign committee, may not solicit, receive, direct, or spend any funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. §441i(a)(1); 11 C.F.R. §300.10(a). Section 441i was upheld in McConnell v. FEC, 540 U.S. 93, 181-84 (2003), and remains valid since it was not disturbed by either Citizens United or SpeechNow. See, e.g., RNC v. FEC, 698 F. Supp. 2d 150, 156-60 (D.D.C. 2010), aff'd, 130 S. Ct. 3544 (2010). (e) Federal officeholders and candidates, and officers of national party committees, may attend, speak at, or be featured guests at fundraisers for independent expenditure only committees at which unlimited individual, corporate, and labor organization contributions will be solicited. The federal officeholders and candidates, and officers of national party committees, must restrict any solicitations they make to funds subject to the limitations, prohibitions, and reporting requirements of FECA.	

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	(f) A federal officeholder or candidate may attend, speak at, or be a featured guest at fundraising events in connection with an election for federal office at which funds outside the amount limitations and source prohibitions of FECA or Levin funds are solicited. 11 C.F.R. §300.64(a)-(b)(1). In the course of participating in such an event, a federal officeholder or candidate may not solicit any funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 11 C.F.R. §300.61. Rather, a federal officeholder or candidate who solicits funds at such an event must limit any solicitation to funds that comply with FECA's contribution limitations and source restrictions. 11 C.F.R. §300.64(b)(2). 14. (a) In Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012) (en banc), the court upheld a Minnesota statutory prohibition on corporations making direct contributions to candidates. (b) The prohibition on contributions was closely drawn to match a sufficiently important governmental interest. Minnesota had the important governmental interest in avoiding quid pro quo corruption and the circumvention of its other limits on contributions. Under Federal Election Commission v. Beaumont, 539 U.S. 146 (2003), the prohibition on corporate contributions was constitutionally permissible, and the Court in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), left Beaumont intact. Like Minnesota's law, the challenged provision in	

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	Beaumont prohibited corporations from making election-related contributions, but allowed corporations to establish, administer, and control a PAC, through which the corporation could solicit contributions. Accord, Iowa Right to Life Committee, Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013) (Iowa statute prohibited direct corporate contributions to a candidate, a candidate's committee, or a political committee; prohibition was constitutional under Citizens United and Beaumont), petition for rehearing and petition for rehearing en banc denied, 2013 U.S. App. LEXIS 14824 (8th Cir. 2013), cert. denied, 2014 U.S. LEXIS 2480 (2014); United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012) (ban on direct contributions by corporations continued in effect under Citizens United and Beaumont; test of constitutionality was whether the ban was closely drawn to match a sufficiently important government interest; prevention of actual and perceived corruption and the threat of circumvention were firmly established government interests that support regulations on campaign financing), cert. denied, 2013 U.S. LEXIS 1810 (Feb. 25, 2013); Ognibene v. Parkes, 671 F.3d 174, 184 (2d Cir. 2012) (court upheld ban on contributions by corporations, partnerships, LLCs, and LLPs; under Beaumont anticorruption interest and prevention of opportunity for an individual donor to circumvent valid contribution limits justified ban), cert. denied, 133 S. Ct. 28 (2012); Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011) (court upheld denial of preliminary injunction against enforcement of ordinance that prohibited any person other than an individual from	

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	contributing to a candidate or candidate-controlled committee; Beaumont continued in effect after Citizens United, and prohibition was closely drawn to the government interest of preventing the circumvention of individual contribution limits; prohibition left individual members of corporations free to make their own contributions and deprived the public of little or no material information; nonindividual entities could make unlimited independent expenditures and unlimited contributions to independent committees that can fund expenditures supporting or opposing candidates); In re Cao, 619 F.3d 410, 423 (5th Cir. 2010) (en banc) (Supreme Court's decision in Citizens United does not provide any reason to change our analysis of the validity of the contribution limits under federal law on political organizations); Green Party of Connecticut v. Garfield, 616 F.3d 189 (2d Cir. 2010) (court, relying on anticorruption rationale of Beaumont, upheld statute that prohibited contributions by state contractors, prospective state contractors, principals of state contractors, and the spouses and dependent children of state contractors; court struck down statute that prohibited contributions by lobbyists because recent corruption scandals had nothing to do with lobbyists, and there was insufficient evidence to infer that all contributions made by state lobbyists gave rise to an appearance of quid pro quo corruption; evidence demonstrating that lobbyist contributions gave rise to an appearance of influence had no bearing on whether prohibition was closely drawn to the state's interest in preventing quid pro quo corruption; a limit on lobbyist	

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	contributions would adequately address the state's interest in combating corruption and the appearance of corruption by lobbyists); Thalheimer v. City of San Diego, 2012 U.S. Dist. LEXIS 6563 (S.D. Cal. 2012) (court, relying on anticorruption rationale of Beaumont, upheld ban on contributions to candidates by nonindividuals other than political parties). (c) A majority of the court in Minnesota Citizens Concerned for Life also held that Minnesota's statutory requirement that all associations make independent expenditures through an independent expenditure political fund is most likely unconstitutional. (d) Minnesota defined an independent expenditure as: an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. Minn Stat. §10A.01, subdiv. 18. (e) Minnesota then required corporations wishing to make independent expenditures to either "form[] and register[] an independent expenditure political fund if the expenditure is in excess of $100 or [contribute to an] existing independent expenditure political committee or political fund." Id. §10A.12, subdiv. 1a; see also Minn. Stat. §211B.15, subdiv.	

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	3. (f) If a corporation chooses to establish a political fund, then the corporation and its political fund are subject to a series of statutory requirements. The corporation must first appoint a treasurer for the political fund, and the treasurer must then register the fund within fourteen days by filling out a two-page form disclosing a list of all the fund's depositories, and the names and addresses of the fund, treasurer, and any deputy treasurers. Id. §§10A.12, subdiv. 3, 10A.14, subdivs. 1, 2. The political fund must also segregate its funds from any other funds. Id. §10A.12, subdiv. 2. If a corporation is the sole donor to its fund, the corporation can segregate funds with an internal bookkeeping device, such as a spreadsheet. (g) Once established, the political fund must file periodic, detailed reports: The fund must file five reports during a general-election year and one report during a non-general-election year. Minn. Stat. §10A.20. The report must disclose: the amount of liquid assets at the beginning of a reporting period; the name and address of each individual or association whose contributions within the year exceed $100; the amount and date of these contributions; the sum of contributions during the reporting period; each loan made or received that exceeds $100; the name and address of the lender; receipts over $100 during the reporting period not otherwise listed; the sum of those receipts; the name and address of each individual or	

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	association to whom the reporting entity made expenditures within the year exceeding $100; the sum of all expenditures made by the reporting entity during the reporting period; the name and address of each political committee, political fund, principal campaign committee, or party unit to which contributions in excess of $100 were made; the sum of all contributions; the amount and nature of any advance of credit incurred; the name and address of each individual or association to whom noncampaign disbursements have been made that aggregate in excess of $100 and the purpose of each noncampaign disbursement; the sum of all noncampaign disbursements; and the name and address of a nonprofit corporation that provides administrative assistance to the political committee or political fund. Minn. Stat. §10A.20. (h) If the political fund has not received or expended money during a designated reporting period, the treasurer must file a statement of inactivity. Minn. Stat. §10A.20, subdiv. 7. (i) The treasurer for a political fund must keep certain records and make them available for an audit. Id. §10A.13. Finally, if a political fund wants to dissolve, it must settle its debts, dispose of its remaining assets, and file a termination report. Id. §10A.24. One method by which a political fund can dispose of its assets is by returning contributions to their sources. Id. §211B.12; §10A.01, subdiv. 26(2). (j) If a corporation chooses to contribute to an existing political fund, then the corporation is subject to fewer	

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	statutory requirements. A for-profit corporation need only provide its name and address for contributions made from its general treasury. A non-profit corporation would also need to disclose information regarding the underlying source of the contribution if the corporation contributed more than $5,000 to a political fund or committee. Similarly, a corporation that solicits and receives contributions for a political fund must disclose the source of the contributions. (k) A majority of the court held that Minnesota failed to show a substantial relation between the its identified interests and the ongoing reporting requirements. The ongoing reporting requirements are initiated upon a $100 aggregate expenditure, and does not match any sufficiently important disclosure interest. Once initiated, the requirements are potentially perpetual regardless of whether the association ever again makes an independent expenditure. The reporting requirements end only if the association dissolves the political fund. To dissolve the political fund, the association must first settle the political fund's debts, dispose of its assets valued in excess of $100–including physical assets and credit balances–and file a termination report with the Minnesota Campaign Finance and Public Disclosure Board. The association's constitutional right to speak through independent expenditures dissolves with the political fund. To speak again, the association must initiate the bureaucratic process again. (l) Minnesota can accomplish any disclosure-related	

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	interests–providing the electorate and shareholders information concerning the source of corporate political speech, deterring corruption, and detecting violations of campaign finance laws–through less problematic measures, such as requiring reporting whenever money is spent, as the law already requires of individuals. (m) Furthermore, the federal disclosure requirements for electioneering communications upheld in Citizens United were much different from the disclosure requirements of the Minnesota statutes: The federal law required filing a disclosure report only when a corporation (or anyone else) spent more than $10,000 on electioneering communications (e.g., a television commercial) during any calendar year. See §434(f)(4) and (g). Then, when a communication disclosed "____ is responsible for the content of this advertising," as required by §441d(d)(2), a citizen could identify the responsible party in public records and discover relevant information. See Citizens United, 130 S. Ct. at 915-16. This event-driven reporting requirement ended as soon as the report was filed. See §434(f)(4) and (g)(1) and (2). The effect of the laws–requiring one-time disclosure only when a substantial amount of money was spent–matched the government's disclosure purpose. In contrast, the effect of Minnesota's ongoing reporting requirements, which are initiated upon $100 aggregate in expenditures, and are unrelated to future expenditures, does not match any particular disclosure	

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	interest. Other requirements, such as requiring a treasurer, segregated funds, and record-keeping, also are only tangentially related to disclosure. [692 F.3d at 875 n. 9] (n) Three dissenting judges argued that Minnesota's carefully crafted disclosure laws protected the public interest of the voting public's right to know where the money is coming from. First, the laws do not require an association to speak through another entity to engage in campaign-related speech. A corporation does not need to be a separate association from a political fund that it establishes. Rather, it can retain full control over the operations of a political fund that it creates, including by appointing a corporate employee or officer as the fund's treasurer and by directing the political fund to return any excess contributions and dissolve. Second, a corporation can contribute an unlimited amount directly to its political fund, and the political fund can use these contributions to make expenditures. (o) The state had three important interests. First, it had the interest in providing the voting public with information about which associations and corporations support particular issues and candidates. Second, shareholders have an important interest, both politically and from a business perspective, in knowing about a corporation's campaign-related speech. Disclosure allows shareholders to determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are in the pocket of so-called money	

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	interests. (p) Third, disclosure requirements serve an important means of gathering the data necessary to detect violations of campaign finance laws. The ongoing reporting requirement allows the state to easily monitor compliance with its disclosure laws and obtain more complete information on political contributions and expenditures. (q) The burdens of compliance were not onerous. A corporation can appoint an employee or officer as treasurer of its political fund. The fund itself can be as simple as an internal bookkeeping device that separates and tracks contributions and expenditures. This internal bookkeeping option significantly limits the cost of complying with Minnesota's regulations. (r) Finally, the $100 reporting threshold was not wholly without rationality. The ongoing reporting requirements were neither heavy nor out of proportion with the state's important interest in disclosure. See SpeechNow.Org v. Federal Election Commission, 599 F.3d 686, 696-98 (D.C. Cir. 2010) (en banc) (upholding 2 U.S.C. §434(a)(4), which requires political committees to file quarterly reports, a pre-election report, and a post-election report in election years; and either semiannual or monthly reports during nonelection years), cert. denied, 131 S. Ct. 553 (2010).	

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	THE PROGENY OF WISCONSIN RIGHT TO LIFE AND CITIZENS UNITED WITH RESPECT TO DISCLOSURE REQUIREMENTS FOR EXPRESS ADVOCACY, ELECTIONEERING COMMUNICATIONS, AND BALLOT MEASURE ADVOCACY 15. Courts have largely upheld disclosure requirements for contributions to and expenditures by organizations that engage in express advocacy, electioneering communications, and ballot measure advocacy. Courts have found that the disclosure requirements satisfy the constitutional test of exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. The sufficiently important governmental interest is to provide information to the electorate so it can make informed decisions on candidates and ballot measures. Courts have struck down disclosure requirements only when the definition of the communications covered is overbroad, North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008), the requirements unduly burden issue advocacy, Wisconsin Right to Life, Inc. v. Barland, 2014 U.S. App. LEXIS 9015 (7th Cir. 2014); New Mexico Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. 2010), or compliance with the requirements is unduly burdensome, especially for small organizations that engage in limited express advocacy activities, Iowa Right to Life Committee, Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013), petition for rehearing and petition for rehearing en banc denied, 2013 U.S. App. LEXIS 14824 (8th Cir. 2013), cert.	

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	denied, 2014 U.S. LEXIS 2480 (2014); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012) (en banc); Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010); Canyon Ferry Road Baptist Church v. Unsworth, 556 F.3d 1021 (9th Cir. 2009). See generally Benjamin Barr & Stephen R. Klein, "Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure," 14 Wyoming Law Review 253 (2014); Kristy Eagan, "Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending," 40 Fordham Urban Law Journal 801 (Dec. 2012); Trevor Potter, "The History of Undisclosed Spending in U.S. Elections & How 2012 Became the 'Dark Money' Election," 27 Notre Dame Journal of Legal Ethics & Public Policy 383 (2013). 16. (a) In North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008), the court addressed the constitutionality of a North Carolina statute's definition of communications that support or oppose a clearly identified candidate. If an individual financially sponsors a communication that meets either one of two prongs of the definition, he or she is deemed to have acted in support or opposition of a clearly identified candidate. (b) The first prong classifies communications as supporting or opposing a clearly identified candidate when they explicitly use any of a set of carefully delineated election-related words or phrases. Examples include: "vote for,'	

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	"reelect," "support," "cast your ballot for," and "(name of candidate) for (name of office)." North Carolina General Statutes §163-278.14A(a)(1). (c) The second prong considered a communication to be in support or opposition to a candidate if its "essential nature … goes beyond a mere discussion of public issues in that [it] direct[s] voters to take some action to nominate, elect, or defeat a candidate in an election. If the essential nature of a communication is unclear, regulators may consider: contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication … in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election. [North Carolina General Statutes §163-278.14A(a)(2)] (d) The court struck down the second prong of the definition as unconstitutional under Wisconsin Right to Life. The statute crossed the boundary between election-related activity subject to regulation, and constitutionally protected political speech. First, the definition did not meet the definition of electioneering communication under FECA. Second, the statute violated the test for permissible regulation of	

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	campaign speech under Wisconsin Right to Life: [I]t cannot be said that communications falling within the ambit of §163-278.14A(a)(2) are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." As stated earlier, *WRTL* specifically counseled against the use of factor-based standards to define the boundaries of speech subject to regulation, since such standards typically lead to disputes over their meaning and therefore litigation. *See WRTL*, 127 S. Ct. at 266. Section 163-278.14A(a)(2) runs directly counter to the teaching of *WRTL* when it determines whether speech is subject to regulation based on how a "reasonable person" interprets a communication in light of four "contextual factors." This sort of *ad hoc*, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech. The very terms of North Carolina's statute — including, but not limited to, "essential nature," "the language of the communication as a whole," "the timing of the communication in relation to events of the day," "the distribution of the communication to a significant number of registered voters for that candidate's election," and "the cost of the communication" — are clearly "susceptible" to multiple interpretations and capable of encompassing ordinary political speech unrelated to electoral activity. For	

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	instance, how is a speaker — or a regulator for that matter — to know how the "timing" of his comments "relate" to the "events of the day"? Likewise, how many voters would be considered "significant"? And at what "cost" does political speech become regulable? [525 F.3d at 283-84] 17. (a) In The Real Truth About Abortion, Inc. v. Federal Election Commission, 681 F.3d 544 (4th Cir. 2012), cert. denied, 2013 U.S. LEXIS 300 (2013), the court addressed the constitutionality of the regulatory definition of "expressly advocating" in 11 C.F.R. §100.22(b). The regulatory definition implements the statutory definition of "independent expenditure" under 2 U.S.C. §431(17), which in turn determines whether a person must make disclosures under 2 U.S.C. §434(c). The statutory definition of independent expenditure is an expenditure by a person "expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. (b) Since the definition triggered disclosure obligations, the test of its constitutionality was exacting scrutiny. This test required the government to show a substantial relation between the disclosure requirement and a sufficiently important government interest. (c) Under 11 C.F.R. §100.22(a), "expressly advocating" is defined in the manner described by the Supreme Court in Buckley by using "magic words." A communication	

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	expressly advocates the election or defeat of a clearly identified federal candidate if it: [u]ses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogans or individual word(s), which in context, can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!" (d) Under 11 C.F.R. §100.22(b), "expressly advocating" means any communication that: When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s) because–(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or	

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	defeat one or more clearly identified candidate(s) or encourages some other kind of action. (e) Under Wisconsin Right to Life and Citizens United, Congress could constitutionally impose disclosure requirements for communications that contain the "magic words" of express advocacy of Buckley, and for communications that are the "functional equivalent" of express advocacy. In addition, Congress could constitutionally impose disclosure requirements for all electioneering communications, including those that are not the functional equivalent of express advocacy. (f) The court pointed out that eight Justices in Citizens United held that since disclosure is a less restrictive alternative to more comprehensive regulation of speech, mandatory disclosure requirements are constitutionally permissible even if ads contain no direct advocacy, and only pertain to a commercial transaction. If mandatory disclosure requirements are permissible when applied to ads that only mention a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible. Accord, Free Speech v. Federal Election Commission, 720 F.3d 788 (10th Cir. 2013), cert. denied, 2014 U.S. LEXIS 3397 (2014). (g) In addition, registration and organizational requirements for political committees are akin to the disclosure	

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	requirements such that, as a constitutional matter, they can be regulated regardless of whether they contain express advocacy or its functional equivalent. In support of this holding, the court relied on National Organization for Marriage v. McKee, 649 F.3d 34, 54-55 & n. 29 (1st Cir. 2011) (Maine's registration requirement for non-major-purpose PACs was a disclosure provision; in light of Citizens United, the distinction between issue discussion and express advocacy has no place in First Amendment review of disclosure-oriented laws). (h) The court also distinguished its decision in Leake. First, the North Carolina statute in Leake was unconstitutional because the terms that defined express advocacy were clearly susceptible to multiple interpretations. In contrast, §100.22(b) applies only to communications that could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates, and for which reasonable minds could not differ as to whether the communication encourages actions to elect or defeat one or more clearly identified candidates, or encourages some other kind of action. (i) The court also held that the electioneering requirements of FECA did not apply in determining whether the disclosure requirements were constitutional: [T]he North Carolina provision in Leake regulated all electoral speech, including, potentially, issue advocacy. To	

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	resolve whether such communications could constitutionally be regulated, we articulated two requirements. First, because the regulation covered electoral speech broadly defined, we applied the requirement in Wisconsin Right to Life, 551 U.S. at 474 n. 7, that it fulfill the statutory definition of "electioneering communication" in 2 U.S.C. §434(f)(3)(A)(i), which, we noted, "refers to a 'clearly identified candidate' within sixty days of a general election or thirty days of a primary election." 525 F.3d at 282. Second, to narrow the alternative definition of "express advocacy" in the North Carolina statute, we relied on the functional-equivalent test developed in Wisconsin Right to Life, 551 U.S. at 469-70. Id. While the functional equivalent test that we applied to narrow the North Carolina definition of express advocacy was drawn from the functional-equivalent test in Wisconsin Right to Life (which itself was evaluating an electioneering communication provision), the Supreme Court has recognized use of the functional-equivalent test to define "express advocacy" wherever the term is used in the election laws. See, e.g., Citizens United, 130 S. Ct. at 915. In contrast, in the case before us, "express advocacy" is a component of an "independent expenditure," regulated under §432(c)(1) and §431(17) and thus may be defined by applying the functional-equivalent test, precisely as Regulation 100.22(b) has done. Because the "electioneering communications" requirements of §434(f)(3)(A)(i) are not statutorily relevant to "independent expenditures," we therefore need not apply those requirements applied in Leake when considering "express advocacy" in the context of	

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	independent expenditures. [681 F.3d at 552-53] (j) Finally, the North Carolina statute in Leake imposed a variety of restrictions on campaign speech, including limits on acceptable contributions and expenditures. Again, following Citizens United, §100.22(b) only implements disclosure requirements. The Supreme Court has routinely recognized that because disclosure requirements impose a lesser burden on speech, it is constitutionally permissible to require disclosure for a wider variety of speech than mere electioneering. (k) Three FEC commissioners take the position that 11 C.F.R. §100.22(b) is unconstitutional. MUR 6543 (Unknown Robo-Call NC), Statement of Reasons of Vice Chairman Donald F. McGahn; MUR 6346 (Cornerstone Action and Friends of Kelly Ayotte), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen. As a result, the commissioners were unable to agree on whether there was express advocacy when a robo-call stated that the caller was "calling to share some thoughts about voting on May 8th of this year," criticized the candidate in that election, and asked "what are we doing sending [the candidate] back to Washington?" MUR 6543 (Unknown Robo-Call NC), at 2. 18. (a) In Center for Individual Freedom, Inc. v. Tennant, 706 F.3d 270 (4th Cir. 2013), the court upheld the constitutionality of the definition of "expressly advocating"	

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	against a vagueness challenge. West Virginia statute defined "expressly advocating" as any communication that: [i]s susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. [W. Va. Code §3-8-1a(12)(C)] (b) The statutory scheme incorporated the phrase "expressly advocating" into the definition of "independent expenditure" and did not include the phrase elsewhere. Under the statute, an "independent expenditure" is "an expenditure . . . [e]xpressly advocating the election or defeat of a clearly identified candidate" and "[t]hat is not made in concert or cooperation with or at the request or suggestion of such candidate, his or her agents, the candidate's authorized political committee or a political party committee or its agents." [W. Va. Code §3-8-1a(15)] (c) The definition of "expressly advocating" under the West Virginia statute was identical to the "functional equivalent" test under Wisconsin Right to Life. Under Real Truth About Abortion, a definition that satisfied the "functional equivalent" test was constitutional. (d) The court struck down the exemption for Section 501(c)(3) organizations from the definition of "electioneering communications." Electioneering communications triggered disclaimer and reporting requirements. Section 3-8-1a(11) of the West Virginia Code defined an electioneering	

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	communication as: any paid communication made by broadcast, cable or satellite signal, or published in any newspaper, magazine or other periodical that: (i) Refers to a clearly identified candidate for Governor, Secretary of State, Attorney General, Treasurer, Auditor, Commissioner of Agriculture, Supreme Court of Appeals or the Legislature; (ii) Is publicly disseminated within: (I) Thirty days before a primary election at which the nomination for office sought by the candidate is to be determined; or (II) Sixty days before a general or special election at which the office sought by the candidate is to be filled; and (iii) Is targeted to the relevant electorate. (e) The statute exempted "communication[s] paid for by any organization operating under §501(c)(3) of the Internal Revenue Code." W.Va. Code §3-8-1a(11)(B)(iv). Since electioneering communications triggered disclaimer and reporting requirements, the test of constitutionality was exacting scrutiny. Under this test, West Virginia had to demonstrate that regulating communications that come within the exemption does not bear a substantial relation to the government interest of providing the electorate with information about the source of campaign-related spending.	

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	(f) The exemption failed exacting scrutiny for two reasons. First, the exemption likely deprived the electorate of information about Section 501(c)(3) organizations' election related activities. Second, the West Virginia Legislature did not set forth comprehensive findings for enacting the exemption. 19. (a) In Center for Individual Freedom, Inc. v. Madigan, 697 F.3d 464 (7th Cir. 2012), the court upheld Illinois' statutory disclosure requirements for groups and individuals that accept contributions, make expenditures, or sponsor electioneering communications in excess of $3,000. The Illinois Election Code drew the key definitions of contribution, expenditure, and electioneering communication from federal law. The only substantive differences were that the Illinois disclosure requirements: (i) covered election activity relating to ballot initiatives, which have no federal analog; (ii) did not exempt from regulation those groups that lacked the major purpose of influencing electoral campaigns; and (iii) covered campaign-related advertisements on the Internet. The court rejected the argument that these differences rendered the disclosure regime unconstitutionally vague and overbroad on its face. (b) Each political committee had to register with the Illinois Board of Elections, maintain records of every contribution received and expenditure made in connection with an election, 10 ILCS 5/9-7, and file a report of all transactions each quarter. 10 ILCS 5/9-10(b). The quarterly report had to	

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	include the total sums of contributions received and expenditures made in the covered period; accountings of the committee's funds on-hand and investment assets held; and the name and address of each contributor who gave more than $150 that quarter. 10 ILCS 5/9-11(a). In addition to the quarterly report, a political committee had to disclose any contribution of $1,000 or more (along with the name and address of the contributor) within five days of its receipt, or within two days if received thirty or fewer days before an election. 10 ILCS 5/9-10(c). For reporting violations, the Board may issue civil fines of no more than $5,000 for any one group (except in the case of willful and wanton violations), or seek to enjoin violators' campaign activities in state court. 10 ILCS 5/9-10. (c) Candidates' campaign organizations and political parties had to register as political committees. 10 ILCS 5/9-1.8(b), (c). In addition, outside groups and private individuals had to register as political committees if, within any twelve month period, they accepted contributions or made expenditures in excess of $3,000 on behalf of or in opposition to any candidate or ballot question. 10 ILCS 5/9-1.8(d), (e). Any entity other than a natural person had to register as a political committee if it made independent expenditures of more than $3,000 within one year. 10 ILCS 5/9-8.6(b). (d) The Illinois disclosure provisions differed from federal disclosure provisions in two respects. First, they extended the disclosure of expenditures and contributions to ballot	

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	initiative campaigns. Second, they regulated as a political committee any organization that exceeds the dollar-limit spending thresholds, while under federal law only those groups with the major purpose of influencing elections must register as political committees. (e) The test of the constitutionality of the disclosure requirements was exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. Citizens United, 130 S. Ct. at 914. (f) The state interest at issue was that of providing the electorate with information as to where political campaign money comes from and how it is spent. This informational interest was sufficiently important to support disclosure requirements. Disclosure requirements advance the public's interest in information by allowing voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. By revealing the sources of a candidate's financial support, disclosure laws alert the voter to the interests to which the candidate is most likely to be responsive and thus facilitate predictions of future performance in office. (g) The court upheld the disclosure requirements for ballot issue campaigns. Because the issues can be complex and the public debate confusing, voters' interest in knowing the	

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	source of messages promoting or opposing ballot measures is especially salient in these campaigns. Because nominally independent political operations can hide behind misleading names to conceal their identity, often disclosure of the sources of their funding may enable the electorate to ascertain the identities of the real speakers. Disclosure enables the electorate to make informed decisions and give proper weight to different speakers and messages. (h) The court acknowledged that disclosure placed two burdens on First Amendment rights. First, disclosure requirements deter contributions or expenditures by some individuals and groups who would prefer to remain anonymous. Second, disclosure requirements can chill donations to an organization by exposing donors to retaliation. (i) The court found that these burdens were modest. Although disclosure requirements may burden the ability to speak, they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. The burden of public identification may foreclose application of disclosure laws to individual pamphleteers, or small neighborhood groups that raise less than $1,000, see Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010) (discussed in Paragraph 24 below), for in these cases the state's interest in disseminating such information to voters is at a low ebb. The plaintiff is a far cry from the lone pamphleteer, and its broad interest in anonymity does not justify invalidating disclosure laws in a	

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	facial challenge brought by a national political advocacy organization that seeks to use the mass media in Illinois to spread its political messages on a broad scale. (j) The record in the facial challenge did not support any prospect of retaliation that could bar application of the disclosure requirements. (k) The court also rejected the argument that the disclosure requirements imposed undue burdens on speakers because the definition of electioneering communication did not adequately distinguish ballot initiative advocacy from pure issue discussion. Under Citizens United, the distinction between express advocacy and issue discussion does not apply in the disclosure context. The court rejected the holding of New Mexico Youth Organized v. Herrera, 611 F.3d 669, 677 n. 4 (10th Cir. 2010) (discussed in Paragraph 22 below), "that for a regulation of campaign related speech to be constitutional it must be unambiguously campaign related." (l) Furthermore, even if disclosure requirements constitutionally applied only to express advocacy and its functional equivalent, Illinois' statutory definition of electioneering communication was limited by language nearly identical to that used in Wisconsin Right to Life to define the functional equivalent of express advocacy. Compare 10 ILCS 5/9-1.14 (the broadcast must be "susceptible to no reasonable interpretation other than as an	

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	appeal to vote for or against a clearly identified candidate, . . . a political party, or a question of public policy that will appear on the ballot") with Wisconsin Right to Life, 551 U.S. at 669-70 (principal opinion) ("a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). (m) In addition, the Illinois' definition of electioneering communication was limited by the same factors as the definition under FECA: medium; total amount spent; temporally; geographically; and content. (n) The court also rejected the argument that the state could constitutionally impose disclosure requirements only on organizations that are under the control of a candidate, or whose major purpose is the nomination or election of a candidate. The court relied on four reasons. First, the major purpose test used by the Court in Buckley was a creature of statutory interpretation, and not a constitutional command. See National Organization for Marriage, 649 F.3d at 59; Human Life, 624 F.3d at 1009-10. (o) The court rejected the holdings of New Mexico Youth Organized v. Herrera, 611 F.3d 669, 677-78 (10th Cir. 2010) (discussed in Paragraph 22 below), and North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008) (discussed in Paragraph 16 above), that the major purpose test must be satisfied before disclosure requirements can	

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	apply. (p) Second, Illinois statute limited political committee status to groups that accept contributions or make expenditures on behalf of or in opposition to a candidate or ballot initiative. (q) Third, application of the major purpose test would yield perverse results. A small group with a major purpose of electing a state representative that spends $3,000 for ads could be required to register as a political committee, while a large group that spends $1,500,000 to defeat the same candidate, but spends far more on noncampaign related activities, would not have to register because the defeat of the candidate would not be the large group's major purpose. National Organization for Marriage, 649 F.3d at 264. (r) Fourth, limiting disclosure requirements to groups with the major purpose of influencing elections would allow even those groups to circumvent the law with ease. Any organization dedicated primarily to electing candidates or promoting ballot measures could easily dilute that major purpose by just increasing its nonelectioneering activities or better yet by merging with a sympathetic organization that engaged in activities unrelated to campaigning. (s) For these four reasons, the major purpose test did not apply to the determination of the constitutionality of disclosure requirements. Instead, the exacting scrutiny test applied.	

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	20. (a) In Wisconsin Right to Life, Inc. v. Barland, 2014 U.S. App. LEXIS 9015 (7th Cir. 2014), the court distinguished Madigan, and applied exacting scrutiny to strike down Wisconsin's registration, reporting, and disclosure requirements for issue advocacy organizations that do not have express advocacy and its functional equivalent as their major purpose. (b) Under the regulation of the Government Accountability Board, GAB §1.28, independent political speakers were subject to the state's PAC regulatory system when they made "a communication for a political purpose." (c) The regulation defined "communication" as "any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose." GAB §1.28(1)(b). (c) The regulation defined political purpose as follows: (3) A communication is for a "political purpose" if either of the following applies: (a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of the candidate: 1. "Vote for;" 2. "Elect;" 3. "Support;" 4. "Cast your ballot for;" 5. "Smith for	

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	Assembly;" 6. "Vote against;" 7. "Defeat;" or 8. "Reject." (b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and: 1. Refers to the personal qualities, character, or fitness of that candidate; 2. Supports or condemns that candidate's position or stance on issues; or 3. Supports or condemns that candidate's public record. [GAB 1.28(b)] (d) The court held that the definition of political purpose under the second sentence of subsection (3)(b) was unconstitutional. The court found that the distinction between express advocacy and issue discussion in the disclosure context continued to be important after Citizens United: This aspect of Citizens United must be understood in proper context. The Court's language relaxing the express-advocacy limitation applies only to the specifics of the disclosure requirement at issue there. The Court was addressing the one-time, event-driven disclosure rule for federal electioneering communications, see 2 U.S.C. §434(f),	

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	a far more modest disclosure requirement than the comprehensive, continuous reporting regime imposed on federal PACs, see id. §434(a)-(b), or even the less burdensome disclosure rule for independent expenditures, see id. §434(c). When the Court said that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," Citizens United, 558 U.S. at 369, it was talking about the disclosure requirement for electioneering communications. In that specific context, the Court declined to apply the express-advocacy limiting principle. But nothing in Citizens United suggests that the Court was tossing out the express-advocacy limitation for all disclosure systems, no matter how burdensome. To the contrary, the Court spent several pages explaining that a corporation's option to form an affiliated PAC is too burdensome to justify banning the corporation itself from speaking. Id. at 337-39. . . . . So it's a mistake to read Citizens United as giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate. That's what GAB §1.28(3)(b) does. During the 30/60-day preelection periods, all political speech about issues counts as express advocacy – thus triggering full political-committee status and other restrictions – if the speaker names and says pretty much anything at all about a candidate for state or local office. [2014 U.S. App. LEXIS 9015, at *88-89]	

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	(e) The court also distinguished Madigan: The Board also relies on a passage in Madigan approving language in the Illinois campaign-finance code that keys that state's regulation of ballot-initiative activity to the making of contributions or expenditures for the purpose of "advocating the defeat or passage of" an initiative. 697 F.3d at 485. This is the language of express advocacy and does not implicate Buckley vagueness and overbreadth concerns. This part of Madigan does not help the Board here. [2014 U.S. App. LEXIS 9015, at *93] (f) The court then struck down GAB §1.91, which imposed the registration and reporting requirements of PACs on organizations that accept contributions for, incur obligations for, or make an independent disbursement exceeding $300 in aggregate during a calendar year regardless of whether express advocacy was the organization's major purpose: For groups that engage in express election advocacy as their major purpose, the PAC regulatory system – with its organizational prerequisites, registration duties, and comprehensive, continuous financial reporting – is a relevantly correlated and reasonably tailored means of achieving the public's informational interest. But the same cannot be said for imposing the same pervasive regulatory regime on issue-advocacy groups that only occasionally engage in express advocacy.	

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	A simpler, less burdensome disclosure rule for occasional express-advocacy spending by "nonmajor-purpose groups" would be constitutionally permissible under Citizens United, which approved BCRA's one-time, event-driven disclosure requirement for federal electioneering communications – again, broadcast ads in excess of $10,000 aired close to an election. 588 U.S. at 366-69. That's a far cry from imposing full PAC-like burdens on all issue-advocacy groups once a modest annual spending threshold is crossed. In effect GAB §1.91 requires every issue-advocacy group to form a PAC before spending as little as $300.01 on express advocacy, whether at election time or any other time of year. Failure to do so brings civil and criminal penalties. [2014 U.S. App. LEXIS 9015, at *103-104] 21. (a) In Family PAC v. McKenna, 2012 U.S. App. LEXIS 1822 (9th Cir. 2012), the court upheld the constitutionality of Washington state's reporting and disclosure requirements for ballot measure committees, but struck down the prohibition on a political committee from accepting from any one person contributions exceeding $5,000 within twenty-one days of a general election. (b) Washington state statute and its administrative code required ballot measure committees to disclose the name and address of contributors giving more than $25, and to disclose the employer and occupation of contributors giving more than $100. Washington Revised Code §42.17.090 and	

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	Washington Administrative Code §390-16-034. (c) Disclosure requirements were subject to the exacting scrutiny standard of review, which meant that they had to be substantially related to a sufficiently important governmental interest. (d) The court held that in requiring the disclosure of contributions to ballot measure committees, Washington had an important governmental interest of informing the voting public. (e) As to the substantial relationship test, the court acknowledged that the disclosure requirements can deter individuals who would prefer to remain anonymous from contributing to a ballot measure committee. Nevertheless, this burden was modest because disclosure requirements do not impose any ceiling on campaign-related activities, and do not prevent anyone from speaking. (f) The court also acknowledged that disclosure requirements can chill contributions to an organization by exposing donors to retaliation. However, the plaintiff made no showing that the disclosure requirements exposed contributors to significant or systemic risk of harassment or retaliation. In the unusual case presenting a genuine threat of harassment or retaliation, the affected party can challenge the disclosure requirements as applied. (g) The court then determined whether the strength of the	

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	governmental interest in disclosure justified these modest burdens. Disclosure enables the electorate to give proper weight to different speakers and messages. The money in ballot measure campaigns produces a cacophony of political communications through which voters must pick out meaningful and accurate messages. Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, being able to evaluate who is doing the talking is of great importance. Furthermore, by knowing who backs or opposes a given initiative, voters will know who stands to benefit from the legislation. This is especially important when one considers that ballot measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. The court concluded that the disclosure requirements impose only modest burdens on First Amendment rights, while serving a governmental interest in an informed electorate that is of the utmost importance. See also ProtectMarriage.com-Yes on 8 v. Bowen, 2014 U.S. App. LEXIS 9312, at *12-13 (9th Cir. 2014) (under exacting scrutiny standard court upheld against facial challenge the requirement of California statute that ballot committees report after an election the contributions made before the election and after the final pre-election reporting deadline; "A state's interests in contribution disclosure do not necessarily end on election day. Even if a state's interest in disseminating accurate information to voters is lessened after the election takes place, the state retains its interests in accurate record-keeping, deterring	

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	fraud, and enforcing contribution limits. As a practical matter, some lag time between an election and disclosure of contributions that immediately precede that election is necessary for the state to protect these interests. In this case, for example, Appellants' contributions surged nearly 40% (i.e., by over $12 million) between the final pre-election reporting deadline and election day. Absent post-election reporting requirements, California could not account for such late-in-the day donations. And, without such reporting requirements, donors could undermine the State's interests in disclosure by donating only once the final pre-election reporting deadline has passed."); Worley v. Florida Secretary of State, 717 F.3d 1238 (11th Cir. 2013) (under exacting scrutiny standard court upheld against facial challenge the requirement of Florida statute for group that spent $600 in radio ads to oppose a state constitutional amendment on a ballot measure to satisfy the registration, organizational, and recordkeeping obligations of a political action committee; court also upheld the absence of a minimum reporting threshold for contributions), cert. denied, 134 S. Ct. 529 (2013); National Organization for Marriage, Inc. v. McKee, 669 F.3d 34 (1st Cir. 2012) (under exacting scrutiny standard court upheld Maine's statutory reporting and disclosure requirements for individuals and groups that receive or make aggregate contributions or expenditures in excess of $5,000 for the purpose on initiating or influencing a ballot measure campaign; the term "influencing" was not unconstitutionally vague because a state agency construed it to apply to communications that expressly advocate for or against a	

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	ballot question, or that clearly identify a ballot question by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the ballot question); Human Life of Washington Inc. v. Brumsickle, 624 F.3d 990, 1011 (9th Cir. 2010) (under exacting scrutiny standard court upheld Washington state's registration, reporting, and disclosure requirements facially and as applied to Human Life, a nonprofit, pro-life advocacy corporation, and its proposed campaign to educate voters about the dangers of physician-assisted suicide in connection with a ballot measure that would legalize the practice; requirements applied to political committee that has as its primary or one of its primary purposes to affect governmental decision making by supporting or opposing candidates or ballot propositions; court rejected Fourth Circuit's position in North Carolina Right to Life Inc. v. Leake, 525 F.3d 274, 289 (4th Cir. 2008), that political committees can only be regulated if they have the support or opposition of candidates as their primary purpose; "Human Life concedes, as it must, that there is a substantial relationship between the government's informational interest and the disclosure requirements it may impose on groups whose single primary purpose is political advocacy. We fail to see how that relationship changes so materially as to render the relationship insubstantial once the groups engage in several primary purposes including political advocacy."), cert. denied, 131 S. Ct. 1477 (2011). (h) The court also held that the $25 and $100 reporting	

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	thresholds were not too low to survive exacting scrutiny. The court acknowledged that public disclosure of a single $25.01 contribution may provide little relevant information to voters. Nevertheless, small contributions may provide useful information to voters when considered in the aggregate. On the government agency's Website, voters can conduct detailed searches and sort ballot measure contribution data by city, state, and zip code. Voters can use this geographical information to determine whether statewide ballot measures are financed by out-of-state contributors, or whether county-wide ballot measures are financed by out-of-county interests. With respect to contributions exceeding $100, voters can also aggregate the data by employer and occupation to determine whether particular economic interests stand to benefit from the legislation. (i) The court distinguished Canyon Ferry (discussed in Paragraph 23 below) and Sampson (discussed in Paragraph 24 below) as striking down reporting requirements as applied to the plaintiffs, rather than contribution disclosure requirements. (j) In addition, disclosure thresholds are inherently exact. Therefore, courts owe substantial deference to legislative judgments fixing these amounts. (k) The court then addressed whether the twenty-one day limit is closely drawn to advance the important interest in giving voters access to contributor information. The court	

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	stated that contribution limits imposed on ballot measure committees burden freedom of association by making it harder for individuals to band together to advance their views on the ballot measure. The limits also burden freedom of speech because limits on contributions affect expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group desiring to engage in political dialogue concerning a ballot measure. (l) The court found that Washington's limit imposes a significant burden because it limits contributions during the critical three-week period before the election when political committees may want to respond to developing events. (m) The court held that Washington's limit was not closely drawn to provide voters with information they need to make informed choices. The limit was not reasonably necessary to inform voters about large contributions made in the final three weeks of the election. Campaign contributions can be reported and made publicly available within minutes and certainly within twenty-four hours. Furthermore, Washington already had in place a system requiring committees during the twenty-one days preceding the election to disclose contributions from large contributors within forty-eight or twenty-four hours of receiving them. (n) It is true that some voters may choose to vote early, and they may not learn of some large contributions until they have already voted. However, voters who cast their ballots while	

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	campaigning is still in full swing make a voluntary choice to forgo relevant information that may come to light in the final three weeks of the campaign. Therefore, the state's interest in informing these voters is a weak one. It is outweighed by countervailing interests, including the right of ballot measure committees to raise and spend funds, the right of individuals to contribute funds to ballot measure committees, and the interest of the voting public in the messages that those committees may convey in the final weeks of the election. 22. (a) In New Mexico Youth Organized v. Herrera, 2009 U.S. Dist. LEXIS 125104 (D.N.M. 2009), the court addressed the constitutionality of New Mexico's statutory political committee registration and reporting requirements as applied to two Section 501(c)(3) organizations, New Mexico Youth Organized ("NMYO"), and Southwest Organizing Project ("SWOP"). (b) In March and April 2009, NMYO and SWOP mailed out advertisements criticizing several incumbent state legislators for the stances that they took on certain initiatives in the legislative session that had just concluded, pointing out the primary sources of the individual legislators' campaign funding, and urging recipients to contact the legislators to express their concerns about the legislators' votes and funding sources. The mailings suggested that the legislators were beholden to corporate interests rather than actually working for the public good. The mailings were targeted to the individual legislators' constituents, and each mailing	

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	mentioned an upcoming special legislative session focused on healthcare that was to take place in the summer of 2008. (c) The mailers sent out by NMYO and SWOP followed similar patterns in their style and content. Generally, the front of the card posed the question of whether the representative in question worked for constituents or special interests, while the back of the card listed the primary sources of the representative's campaign funding, highlighted the representative's recent votes on several bills, noted that a special session of the legislature focusing on healthcare was upcoming, and urged recipients to call the representative and ask that he represent their interests rather than corporate interests at the upcoming session. (d) The New Mexico Secretary of State sought to require NMYO and SWOP to register as political committees under the New Mexico Campaign Reporting Act based solely on the mailings. (e) Under NMSA §1-19-26(L) of the Campaign Reporting Act, a political committee was defined as follows: L. "political committee" means two or more persons, other than members of a candidate's immediate family or campaign committee or a husband and wife who make a contribution out of a joint account, who are selected, appointed, chosen, associated, organized or operated primarily for a political purpose; and political committee	

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	includes: (1) political action committees or similar organizations composed of employees or members of any corporation, labor organization, trade or professional association or any other similar group that raises, collects, expends or contributes money or any other thing of value for a political purpose; (2) a single individual who by his actions represents that he is a political committee; and (3) a person or an organization of two or more persons that within one calendar year expends funds in excess of five hundred dollars ($500) to conduct an advertising campaign for a political purpose. (f) Under NMSA §1-19-26(M) of the Campaign Reporting Act, political purpose was defined as "influencing or attempting to influence an election or pre-primary convention, including a constitutional amendment or other question submitted to the voters." (g) The registration requirements for political committees made it unlawful for a political committee to receive any contribution or make any expenditure unless the committee registered with the Secretary of State. Political committees had to file annual reports of contributions and expenditures, which included the name and address of the person or entity to whom an expenditure was made or from whom a	

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	contribution was received. NMSA §1-19-26.1, 27, 29, 31, 34.6, and 36(A). (h) The court addressed two issues. First, were the mailings issue advocacy constitutionally protected from the political committee registration requirement? Second, were the mailings a constitutionally sufficient basis to classify NMYO and SWOP as political committees subject to the Campaign Reporting Act's registration and reporting requirements? (i) The court held that the mailings were issue advocacy constitutionally protected from political committee registration requirements. Under Buckley v. Valeo, 424 U.S. 1, 80 (1976), only those activities that are "unambiguously related to the campaign of a particular" candidate may constitutionally be subject to regulation. In addition, under Buckley only those contributions made directly to a campaign or in coordination with a campaign, or those independent expenditures "for communications that expressly advocate the election or defeat of a clearly identified candidate" are subject to regulation. 424 U.S. at 80. Furthermore, under WRTL, a communication is the equivalent of express advocacy only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. 2652, 2665 (2007). (j) The court construed the New Mexico statute defining "political purposes" as "influencing or attempting to	

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	influence an election" to reach only those contributions or expenditures that are unambiguously campaign related in that they are used for communications that constitute express advocacy for the election or defeat of a clearly identified candidate, or its functional equivalent. Under this standard, the mailings of NMYO and SWOP were not unambiguously campaign related. They did not mention any future primary or general election in which the targeted legislators would be running. Instead, the mailings all referenced an upcoming special session of the legislature that was focused on healthcare, and urged recipients to contact their legislator with respect to that issue. (k) The court also held that NMYO and SWOP could not constitutionally be classified as political committees. Under Buckley, a "political committee" can "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Under Colorado Right to Life Committee, Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007), the major purpose test focused on the major purpose of the organization rather than a particular expenditure. A court determined an organization's major purpose by examining the organization's central organizational purpose, or comparing the organization's independent electioneering spending with its overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates.	

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	(l) The court held that the New Mexico statute's definition of a political committee to include, by default, any organization that spent over $500 in one year on a political ad campaign, was unconstitutional as applied to NMYO and SWOP. The statute completely subverted Buckley's major purpose test "by classifying an electioneering expenditure greater than $500 as irrefutably constituting the organization's primary purpose, regardless of what percentage of operating funds the expenditure constituted or what else the organization spent its resources on. By defining spending over $500 on an election-related ad as sufficient to subject an organization to the full panoply of regulations otherwise reserved solely for organizations whose primary purpose is to advocate for or against candidates, the statute renders the 'major purpose' test completely superfluous." 2009 U.S. Dist. LEXIS 125104, at *44-45. (m) Applying the New Mexico statute to NMYO and SWOP showed that the statute was overreaching in its coverage: NMYO's yearly budget is approximately $255,000. SWOP's yearly budget is approximately $1,100,000. Thus, under NMCRA, these organizations would be classified as "political committees" if they spent as little as 2/10 of one percent and 5/100 of one percent of their budgets, respectively, on electioneering communications. Taking it out of the realm of the hypothetical, in this case, NMYO spent approximately $15,000 on the mailings, which amounts to less than seven percent of its budget, and SWOP spent	

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	approximately $6,000 on the mailings, which amounts to just over 1/2 of one percent of its budget. Such proportionally small expenditures, standing alone, cannot justify characterizing an organization's "major purpose" as electioneering. A statute that subjects organizations to the burdens of registering as political committees based solely on such insubstantial expenditures is not narrowly tailored and cannot survive exacting scrutiny. 2009 U.S. Dist. LEXIS 125104, at *46-47. (n) Finally, the court held that although the state can require disclosure of campaign related contributions and expenditures, it cannot require disclosure of every organizational contribution and expenditure if the organization's major purpose is not the nomination or election of a candidate. (o) The Tenth Circuit Court of Appeals affirmed the trial court. 611 F.3d 669 (10th Cir. 2010). Under the central purpose formulation or the expenditure formulation of the major purpose test, the organizations did not qualify as political committees. As to the central purpose test, neither organization ever advocated for the election or defeat of any candidate for office. NMYO's goals were to educate young New Mexicans on issues of importance to them, and to engage in research, leadership development, and nonpartisan get-out-the-vote activities. SWOP's goals were to empower Latino and other people of color, low-income individuals, and young people to realize racial and gender equality and	

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	social and economic justice, and to engage in nonpartisan get-out-the-vote activities, training and leadership development, and community development. As to the expenditure test, neither group spent a preponderance of its expenditures on express advocacy or contributions to candidates. See also Delaware Strong Families v. Biden, 2014 U.S. Dist. LEXIS 43121, at *39 n. 21 (D. Del. 2014) (court applied exacting scrutiny standard and granted a preliminary injunction prohibiting enforcement of statutory reporting requirements against a Section 501(c)(3) organization that distributed a voter guide over the Internet within sixty days of Delaware's general election; statute was overbroad since it captured neutral communication no matter how indirect and unrelated it was to the electoral process; "Any one who contributes to such civic organizations as the League of Women Voters, the American Civil Liberties Union of Delaware, or Common Cause might well expect to have their names and addresses listed as a matter of public record, because such organizations tend to discuss the actions of clearly identified public officials. The Act, however, is broad enough to cover the contributors to any charitable organization, e.g., those advocating such causes as a cure for cancer or support for wounded veterans, if the organization publishes a communication within the critical time frame that so much as mentions, even in a non-political context, a public official who happens to be a candidate."). 23. (a) In Canyon Ferry Road Baptist Church v. Unsworth, 556 F.3d 1021 (9th Cir. 2009), the court addressed the	

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	constitutionality of Montana's statutory financial and organizational disclosure requirements for an incidental committee. (b) Montana statute required an incidental committee to report all transactions, regardless of the amount involved that qualify as expenditures or contributions, and are made by the committee in connection with a statewide issue. An incidental committee must make quarterly filings and at other times near an election. If an incidental committee makes a one-time political expenditure, it may file a combined initial and closing report that terminates its status. In either case, initial registration as an incidental committee must occur within five days of making a political expenditure. (c) Canyon Ferry Road Baptist Church, an incorporated religious institution located in East Helena, Montana, adhered to the Christian doctrines of the Southern Baptist Convention. Among these doctrines was the belief that marriage may exist only between one man and one woman. In the spring of 2004, the Church's Pastor, Berthold Gotlieb Stumberg, III, became interested in possible ways in which the Church could assist in an effort to collect signatures to place Constitutional Initiative No. 96 ("CI-96") on the Montana state ballot the following November. If placed on the ballot and approved by Montana's voters, CI-96 would amend the Montana state constitution to define marriage as a union between one man and one woman. For the signatures	

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	to be effective, the signed petition forms had to be turned over to the sponsoring organization and then submitted to appropriate election officials no later than June 18, 2004. In May 2004, Terri Paske, a member of the Church who campaigned for CI-96, printed out a template CI-96 petition from the Montana Family Foundation Website and made less than fifty copies of the petition on the Church's copy machine, using her own paper. With Stumberg's approval, Paske placed roughly twenty copies of the petition in the Church's foyer. (d) The court held that the disclosure requirements, as applied to the Church's one-time in-kind de minimis expenditures for the use of the copy machine and foyer, violated the Church's First Amendment rights. The test of constitutionality was whether the disclosure requirement had a substantial relation to an important state interest. (e) The court found that the state's interest in providing its citizens with information about the constituencies supporting and opposing ballot issues was an important state interest. (f) The court found the constitutional defect in the failure of the informational value to the public derived from disclosure of the Church's de minimis in-kind expenditures to justify the burden imposed by the reporting requirement. The court held that "as the monetary value of an expenditure in support of a ballot measure approaches zero, the voters can learn little about the financial backing of the ballot proposition by	

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	access to information about the Church's activities of minimal economic effect. Meanwhile, the burden of reporting remains constant even though the size of the in-kind expenditure decreases to a negligible level." 556 F.3d at 1033-34. The court concluded that "the value of public knowledge that the Church permitted a single like-minded person to use its copy machine on a single occasion to make a few dozen copies on her own paper—as the Church did in this case—does not justify the burden imposed by Montana's disclosure requirements." 556 F.3d at 1034 (footnote omitted). 24. (a) In Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010), the court relied on Canyon Ferry (discussed in Paragraph 23 above) and Citizens United in holding that application of Colorado's disclosure requirements for contributions to a ballot initiative committee violated the First Amendment right to freedom of association. (b) Residents of Parker North, a neighborhood of about 300 homes in an unincorporated part of Douglas County, Colorado, opposed the annexation of their neighborhood into the Town of Parks. The residents raised less than $1,000 in monetary and in-kind contributions for their cause when supporters of annexation challenged the failure of the residents to register as an issue committee. (c) Colorado law required that any group of two or more persons that accepted or made contributions or expenditures	

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	exceeding $200 to support or oppose a ballot issue must register as an issue committee, and report the names and addresses of anyone who contributes $20 or more. (d) The Colorado Constitution defined "issue committee" as: any person, other than a natural person, or any group of two or more persons, including natural persons: (I) [t]hat has a major purpose of supporting or opposing any ballot issue or ballot question; [and] (II) [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question. [Colo. Const. art. XXVIII, §2(10)(a)(I)-(II).] (e) Colorado law imposed the following obligations on issue committees. All monetary contributions had to be deposited in a separate account in the committee's name; no contribution or expenditure exceeding $100 may be in cash. Colo. Const. art. XXVIII, §3(9), (10). The Colorado Fair Campaign Practices Act (the Campaign Act) required an issue committee to register with the appropriate officer (usually the Secretary of State or County Clerk) before accepting contributions. See Colo. Rev. Stat. §1-45-108(3). The statement of registration must include the name of the issue committee; the name of a registered agent; the committee's address and telephone number; the identities of all affiliated candidates and committees; and the "purpose or nature of interest" of the committee. Id. (f) The reports were public records and were made available	

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	on the Secretary of State's Website. See Colo. Rev. Stat. §1-45-109(4)-(5). Failure to comply with the registration and reporting requirements could result in civil penalties "of fifty dollars per day for each day that a statement or other information required to be filed [by the Constitution or the Campaign Act] is not filed by the close of business on the day due," Colo. Const. art. XXVIII, §10(2)(a), although the Secretary or an administrative law judge (ALJ) can set aside or reduce a penalty upon a showing of good cause. See id. § 10(2)(b), (c). (g) Private citizens could enforce these provisions by filing with the Secretary of State a written complaint alleging a violation of the registration or reporting requirements. See Colo. Const. art. XXVIII, §9(2)(a). Within three days of filing, the Secretary must refer the complaint to an ALJ who "shall hold a hearing within fifteen days of the referral of the complaint, and shall render a decision within fifteen days of the hearing." Id. If the ALJ determines that a violation occurred, the judge's decision "shall include any appropriate order, sanction, or relief authorized" under Article XXVIII of the state constitution. Id. Further, a party in such a proceeding may be entitled to recover its attorney fees from an opposing attorney or party who brought or defended an action without "substantial justification." Colo. Rev. Stat. §1-45-111.5(2). The ALJ's decision "shall be final and subject to review by the [Colorado] court of appeals." Colo. Const. art. XXVIII, §9(2)(a). The Secretary can enforce the decision; but if the Secretary does not file an enforcement	

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	action within 30 days of the decision, the private complainant may institute a private action for enforcement. See id. "The prevailing party in a private enforcement action shall be entitled to reasonable attorneys fees and costs." Id. (h) The test for the constitutionality of disclosure requirements in the electoral context was that there had to be a substantial relation between the disclosure requirement and a sufficiently important government interest. There were three potential government interests for the disclosure requirements. The first justification, facilitating the detection of violations of contribution limitations, did not apply because contribution limitations in the ballot issue context are constitutionally impermissible. The second justification, deterring corruption and its appearance, did not apply because quid-pro-quo corruption cannot arise in a ballot issue campaign. (i) The third justification was the public interest in knowing who is spending and receiving money to support or oppose a ballot issue. The court held that the burden on the residents' right to association imposed by Colorado's registration and reporting requirements cannot be justified by the public interest in disclosure. The residents' expenditures were "sufficiently small that they say little about the contributors' views of their financial interest in the annexation issue. One can question the value to the electorate of knowing that the contributors to Plaintiffs' committee might think that they will financially benefit from defeat of the annexation by more	

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	than the amount of their contributions." 625 F.3d at 1261. The court also held that "the financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if nonexistent, in light of the small size of the contributions." Id. Moreover, the purpose of the provisions of the Colorado Constitution governing campaign finances was to prevent large contributions from wealthy contributors from exercising a disproportionate level of influence over the political process. This purpose was not at issue with the residents' committee. Accordingly, there was no substantial relation between the disclosure requirements and a governmental interest that was sufficiently important to justify the burden on the freedom of association. See also Justice v. Hosemann, 2013 U.S. Dist. LEXIS 140666 (N.D. Miss. 2013) (small group of individuals sought to place an advertisement in a local newspaper, distribute flyers, and purchase posters in support of a constitutional ballot measure to prohibit state and local government from taking private property by eminent domain and then conveying it to other persons or private businesses for ten years after acquisition; court, citing Sampson v. Buescher and Canyon Ferry, held that the application of Mississippi's statutory political committee registration requirements to this group violated its First Amendment rights; statute required a group to form a political committee and file a statement of organization within ten days after it receives contributions or makes expenditures in excess of	

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	$200; statement of organization had to include the name and address of the committee and all officers, provide the name of the director of the committee and the treasurer, and set forth a brief statement identifying the measure that the committee sought to pass or defeat; committee also had to file monthly reports until it no longer received funds or made expenditures; monthly reports had to include information on the committee's funding sources and organizations that received disbursements from the committee, and totals for the committee's cash on hand and cash equivalents). 25. (a) In Iowa Right to Life Committee, Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013), petition for rehearing and petition for rehearing en banc denied, 2013 U.S. App. LEXIS 14824 (8th Cir. 2013), cert. denied, 2014 U.S. LEXIS 2480 (2014), the court, relying on its earlier opinion in Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012) (en banc) (discussed in Paragraph 14 above), considered an as-applied challenge to the disclosure requirements for groups whose major purpose is not nominating or electing candidates. The court evaluated the challenge under an exacting scrutiny standard. (b) Under Iowa statute and its administrative code, an independent expenditure committee must file with the Iowa Ethics and Campaign Disclosure Board an "independent expenditure statement" and an "initial report" within forty-eight hours of making an independent expenditure over $750, or within forty-eight hours of "disseminating the	

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	communication to its intended audience, whichever is earlier." Iowa Code §§68A.404(3), 68A.404(4)(a); Iowa Admin. Code rs. 351-4.9(15), 351-4.27(4). (c) A person who makes an independent expenditure uses Form Ind-Exp-O, a one page document, to electronically file both the independent expenditure statement and the initial report. See Iowa Admin. Code rs. 351-4.9(15), 351-4.27(2). The registration portion of the form requires the name and contact information of the organization and an individual within the organization. The rest of the form requires contact information for the funding source of the independent expenditure (and for any beneficiary of the expenditure), and information about the expenditure itself, including the date and amount, how the message is communicated, and the position advocated. (d) The court held that the registration portion of Form Ind-Exp-O was constitutional as applied to groups whose major purpose is not nominating or electing candidates. Requiring the name and address of the person making the independent expenditure provides transparency that enables the electorate to make informed decisions and give proper weight to different speakers and messages. In addition, the basic information that Form Ind-Exp-O requires is not overly burdensome. Only when a person makes an independent expenditure is the requirement triggered. (e) The court also held that the information in the "initial	

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	report" section of Form Ind-Exp-O was not overly burdensome. This information – the name and address of the funding source for, and beneficiary of, the independent expenditure, and brief details of the expenditure itself – was similar to a one-time, event-driven report. Requiring reporting whenever money is spent is a constitutional way to accomplish disclosure-related interests. (f) The court also upheld the constitutionality of forty-eight hour reporting. Requiring prompt disclosure within forty-eight hours bore a substantial relationship to Iowa's sufficiently important interest in keeping the public informed. The forty-eight hour deadline made disclosure more effective because it was rapid and informative, and more quickly provided the electorate with information about the sources of election-related spending. With modern technology, the burden of completing the short, electronic form within two days of making a $750 expenditure was not onerous. (g) The court then found unconstitutional the requirement of after filing the initial report, an independent expenditure committee had to file subsequent reports according to the same schedule as the office or election to which the independent expenditure was directed, for up to four times during an election year. Iowa Code §68A.404(3)(a). The committee had to continue to file reports until the committee filed a notice of dissolution. Iowa Admin. Code r. 351-4.9(15).	

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	(h) The subsequent reports required disclosure of: (1) the amount of cash on hand at the beginning of the reporting period; (2) the name and mailing address of each person who made contributions of money or in-kind contributions above $25 in many instances; (3) the total amount of contributions made to the committee during the reporting period; (4) loans made; (5) the name and mailing address of each person to whom disbursements or loan repayments have been made using contributions received, and the amount, purpose, and date of each disbursement; (6) disbursements made to or by a consultant, disclosing the name and address of the recipient, amount, purpose, and date; (7) the amount and nature of debts and obligations owed in excess of specified amounts; and (8) other pertinent information. Iowa Code §68A.402A(1). (i) The court held that by conditioning the right to speak on cumbersome ongoing regulatory burdens, regardless of the committee's major purpose, Iowa's disclosure law discouraged non-PACs, particularly small ones with limited resources, from engaging in protected political speech. Requiring a group to file perpetual, ongoing reports regardless of its purpose, and regardless of whether it ever made more than a single independent expenditure, was no more than tenuously related to Iowa's informational interest. Furthermore, having independent expenditure committees file a one-time report whenever money was spent – similar to the initial report – would be less problematic and allow Iowa to achieve its interest in helping the public make informed	

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	choices in the political marketplace. (j) The court also struck down the requirement that an independent expenditure committee file a supplemental report if, after October 19, but before the election in an election year, it either raised or expended more than $1,000. Iowa Code §§68A.402(2)(a)-(b), 68A.404(3)(a)(1). (k) Under the first supplemental reporting requirement, after a group made a single independent expenditure, it had to continually disclose funds it raised over $1,000 – regardless of whether the group ever used the funds to make an independent expenditure. Non-PACs already had to report expenditures over $750, and the sources of those funds, in the independent expenditure statement – tied to an actual expenditure – making both supplemental reporting requirements redundant. Iowa Code §68A.404(3). Since the obligations continue until the independent expenditure committee was dissolved, to escape the ongoing burdens, the committee had to file a termination statement. Iowa's supplemental reporting requirements thus extended the ongoing reporting requirements, untethered from continued speech, that hinder groups from participating in the political debate and limit their access to the citizenry and government. (l) More troubling, each supplemental report required compliance with the onerous filing requirements of Iowa Code §68A.402A. Iowa Code §68A.404(3)(a). Iowa did not show how requiring additional, redundant, and more	

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	burdensome reports fulfilled a sufficiently important informational interest not already advanced by the independent expenditure statement. (m) The court also struck down the requirement that when an independent expenditure committee determines that it will no longer make an independent expenditure, it must notify the board within thirty days after such determination by filing a termination report. Iowa Code §68A.402B(3). (n) The court found that the termination requirement was part of the ongoing reporting requirements, and therefore for a committee to speak again, it had to initiate the bureaucratic process again. The termination requirement interfered with the constitutionally protected marketplace of ideas, because it forced a group to decide whether it will give up its right to speak. To speak again, it had to decide whether renewing the ongoing reporting cycle was worth the effort. Furthermore, the termination requirement did not support an informational interest since the termination report did not provide disclosure of actual contributions and expenditures. (o) Finally, the court addressed an equal protection challenge under the Fourteenth Amendment to the requirement that an independent expenditure statement filed with the Iowa Ethics and Campaign Disclosure Board contain a certification by an officer of a corporation that the corporation's board of directors authorized the independent expenditure within the calendar year in which the expenditure was incurred. Iowa	

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	Code §68A.404(5)(g). (p) Since Iowa failed to show any interest in singling out corporations, the court struck down the certification requirement. DEFINITIONS OF EXPRESS ADVOCACY AND ELECTIONEERING COMMUNICATION 26. (a) Since an organization whose major purpose is to engage in express advocacy must register as a political committee, 2 U.S.C. §431(4)(A); Buckley v. Valeo, 424 U.S. 1, 79 (1976), and an organization that makes independent expenditures that constitute express advocacy must satisfy disclosure requirements, 2 U.S.C. §434(c); 11 C.F.R. §109.10(e), the determination of whether a communication is express advocacy is of critical importance. In addition, since an organization that makes electioneering communications must also satisfy disclosure requirements, the determination of whether a communication is an electioneering communication is also of critical importance. (b) In Hispanic Leadership Fund, Inc. v. Federal Election Commission, 2012 U.S. Dist. LEXIS 144719 (E.D. Va. 2012), the court ruled on whether five advertisements were electioneering communications. Advertisement One begins with video images of gas prices and gasoline pumps, while an announcer says, "Since this Administration began, gas prices are up 104%. And the U.S. still spends over $400 billion a year on foreign oil." The advertisement continues, showing	

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	an image of the White House while the announcer says, "The White House says: We must end our dependence on foreign oil." The video then changes to images of oil rigs and science labs, while the announcer says, "But the Administration stopped American energy exploration." The video then changes to stock footage "of 'Denied' Stamp with image of [the] White House," while the announcer states, "and banned most American oil and gas production–the White House wants foreign countries to drill–so we can buy from them." The video then changes to an image described only as "Middle East oil" as the announcer states "Keeping us dependent on foreign oil–and crippling our economy." The advertisement closes by showing the onscreen text "Call the White House at (202) 456-1414," while the announcer says, "Tell the White House it's time for an American energy plan . . . that actually works for America." (c) The court held that Advertisement One is an electioneering communication because it is apparent that the references to "the White House" and "the Administration" are contextually unambiguous references to a candidate for public office, President Obama. (d) Advertisement Two begins with video images of gas prices and gasoline pumps, while the announcer states, "Since 2008 began, gas prices are up 104%. And the U.S. still spends over $400 billion a year on foreign oil." The advertisement the shows an image of the Washington Monument, while the announcer states, "The government	

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	says," followed by an audio clip of President Obama saying, "We must end our dependence on foreign oil." The video then changes to images of oil rigs and science labs, while the announcer states, "But the government stopped American energy exploration." The video changes to stock footage of a "'Denied' Stamp with image of the Washington Monument," while the announcer states "and banned most American oil and gas production–the government wants foreign countries to drill–so we can buy from them." The video then changes to an image described only as "Middle East oil" as the announcer states, "Keeping us dependent on foreign oil–and crippling our economy." The advertisement closes by continuing to show the Middle East oil image, while the announcer states, "Tell the government it's time for an American energy plan . . . that actually works for America." (e) The court held that Advertisement Two is not an electioneering communication because it is not apparent that the reference to "the government" is a contextually unambiguous reference to President Obama. An audio clip of President Obama speaking only an eight word sentence is immediately preceded by the announcer saying "the government says." Other than the audio clip, there is no other reference to President Obama, nor is there any reference to "the White House" or to "the Administration." Because the audio clip of President Obama is not identified as such, whether the advertisement refers to President Obama depends entirely on whether the viewer actually recognizes the voice of the person speaking. Although the FEC argues	

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	that President Obama's voice is widely recognized, there is no factual basis for reaching this conclusion. (f) Advertisement Three begins with video images of gas prices and gasoline pumps, while the announcer states, "Since 2008 began, gas prices are up 104%. And the U.S. still spends over $400 billion a year on foreign oil." The advertisement then shows an image of the Washington Monument, while the announcer states, "The government says," followed by an audio clip of the White House Press Secretary saying, "We must end our dependence on foreign oil." The video then changes to images of oil rigs and science labs, while the announcer states, ":But the government stopped American energy exploration." The video changes to stock footage of a '"Denied' Stamp with image of [the] Washington Monument, while the announcer states "and banned most American oil and gas production–the government wants foreign countries to drill–so we can buy from them." The video then changes to an image described only as "Middle East oil" as the announcer states, "Keeping us dependent on foreign oil–and crippling our economy." The advertisement closes by showing the onscreen text "Call the White House at (202) 456-1414," while the announcer says, "Tell the government it's time for an American energy plan . . . that actually works for America." (g) The court held that Advertisement Three is not an electioneering communication because it is not apparent that	

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	references either to "the government" or to "the White House" are contextually unambiguous references to a candidate. Although there is an audio clip of the White House Press Secretary, there is no identification as such as there is nothing in the record to suggest that an objective listener would recognize the voice of the White House Press Secretary. Since it is not apparent that either "the government" or "the White House" unambiguously refers to President Obama, this advertisement is not an electioneering communication. (h) Advertisement Four opens with a series of images described as "Americana," "the Washington Monument," "the United States Supreme Court courthouse," and "the United States Capitol," while the announcer states, "The most basic American right . . . the First Amendment freedom of religion." The advertisement then shows images of the Department of Health and Human Services building, while the announcer states, "But the Administration is taking a stand on a critical question of religious liberty. Against the U.S. Catholic bishops . . . and people of faith across the country." The advertisement then shows images of churches and families, while the announcer states, "Forcing religious institutions to pay for abortion-causing drugs . . . Violating their conscience and religious beliefs." The advertisement then closes by showing White House footage and images with the onscreen text "Call Secretary Sebelius at 1-877-696-6775," while the announcer says, "Call Secretary Sebelius, tell her it's wrong for her and the Administration to trample	

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	the most American right." (i) The court held that Advertisement Four is an electioneering communication because it is apparent that "the Administration" is a contextually unambiguous reference to President Obama. The term "the Administration" is used in the context of telling viewers to call Secretary Sebelius to "tell her that it's wrong for her and the Administration to trample [this right]" while displaying footage of the White House. This combination of "the Administration" an entity separate from Secretary Sebelius with the footage of the White House makes clear that the "the Administration" refers to President Obama–he is the head of the Administration and he resides and works at the White House. (j) Advertisement Five opens with a video of a toddler throwing a tantrum while the announcer states, "The Terrible Twos." The image then changes to a frustrated parent holding a toddler, while the announcer states, "All parents dread the phrase." The text, '"White House will not mark two year anniversary' of health care law (Washington Free Beacon, 3/19/12)," is displayed, while the announcer states, "And now that government run healthcare is turning two, its own parents don't even want to celebrate. The health care law is showing all the Terrible Two warning signs." The advertisement then shows videos of toddlers, while the announcer states, "Mood swings . . . Temper tantrums." As the video continues, the text "[as much as a] '3 percent increase in health insurance premiums' (FactCheck.org,	

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	1/4/12)" is displayed as the announcer states, "It was supposed to lower premiums, now it's going to cost you more." The text then changes to '"CBO: . . . to cost twice as much' (Fox News, 3/16/12)," while the announcer states, "Yes, the Terrible Twos are more expensive than you think." The onscreen text changes to "[Many workers] 'will not, in fact, be able to keep what they currently have' (Time, 6/24/10)," while the announcer states, "The toddler will tend to say 'no' a lot." The onscreen text then changes to '". . . allies get waivers . . . ' (Washington Examiner, 5/23/11)," while the announcer states, "Some parents will give in to the child's every demand. Doing so can have short-term benefits, but in the long term, this will create a monster." The toddler sequence then closes with the on-screen text changing to "'crushing penalties' (Human Events, 3/4/12)," while the announcer states, "Sadly, most parents have to pay the price for not complying with these mandates." The image then changes to the text, "'White House will not mark two-year anniversary' of health care law (Washington Free Beacon, 3/19/12)," while the announcer then states, "So . . . Since its family won't wish its health care law a happy birthday." The image then changes to the text, "Happy 2nd Birthday, Meh" and "HispanicLeadershipFund.org," as the announcer states, "I guess we'll have to. Happy Birthday national, government healthcare, may none of your wishes come true." (k) The court held that Advertisement Five is an electioneering communication because it is apparent that the	

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	term "the parent" is a contextually unambiguous reference to President Obama. The announcer refers to "the parents of government run health care," and "its family" while the text "White House will not mark two year anniversary" is displayed. Taken together, this combination of footage and audio is a clear reference to President Obama; there are two "parents" to the health care bill, Congress and the President, and the text that refers to the White House makes clear that "the parent" referred to in the advertisement is President Obama. 27. (a) In FEC Advisory Opinion No. 2012-27, the FEC opined that the following three advertisements were not express advocacy. (b) The Ethically Challenged advertisement stated, "Nydia Velazquez. Ethically challenged. A key supporter of the Troubled Asset Relief Program. Calls bailed-out Wall Street greedy one day, but takes hundreds of thousands from it the next. A leader you can believe in? Call Nydia Velazquez and let's make sure we end the bailouts that bankrupt America." (c) The Stop the Liberal Agenda advertisement stated, "Harry Reid: Willing to put America's service men and women at risk through his risky sequestration gamble. Willing to put politics above common sense and protecting the men and women who defend our nation. Stop the insanity, stop sequestrations, stop Reid's twisted liberal agenda. This fall,	

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	get educated about Harry Reid, get engaged, and get active." (d) The Don't Trust Harry Reid advertisement stated, "What kind of leader is Harry Reid? Ineffective. Ultra-liberal. Unrepresentative of Nevada values. Harry Reid voted for increasing Tricare premiums to nickel and dime America's heroes. Veterans and service men and women know better than to trust Harry Reid. This November: support new voices, support your military, support Nevada values." 28. (a) In FEC Advisory Opinion No. 2012-11, the FEC opined on whether the following advertisements were express advocacy. (b) The Financial Reform radio and newspaper advertisements stated, "President Obama supported the financial bailout of Fannie Mae and Freddie Mac, permitting himself to become a puppet of the banking and bailout industries. What kind of person supports bailouts at the expense of average Americans? Not any kind we would vote for and neither should you. Call President Obama and put his antics to an end." (c) The FEC opined that the Financial Reform advertisements contained express advocacy under 11 C.F.R. 100.22(a). They identify a candidate (President Obama) with a position on an issue (bailouts), and then state that the viewers should vote against those who take that issue position. In addition, the final sentence, "Call President Obama and put his antics to an end," does not negate the fact the advertisements contain	

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	express advocacy. (d) The Health Care Crisis radio and newspaper advertisements stated, "President Obama supports socialized medicine, but socialized medicine kills millions of people worldwide. Even as Americans disapproved of ObamaCare, he pushed ahead to make socialized medicine a reality. Put an end to the brutality and say no to socialized medicine in the United States." (e) The FEC opined that the Health Care Crisis advertisements were not express advocacy because they did not have any electoral reference. (f) The Gun Control Facebook advertisement stated, "(Picture of handgun, 110 pixels wide by 80 pixels tall) (Title: Stand Against Gun Control) Obama supports gun control. Don't trust him. Support Wyoming state candidates who will protect your gun rights. (g) The FEC opined that the Gun Control Facebook advertisement was not express advocacy because it did not have any federal electoral references. (h) The Ethics Television advertisement provided, "Audio: Who is President Obama? Video: Picture of President Obama shaking hands with Hugo Chavez. Audio: He preaches the importance of high taxes to balance the budget, but nominates political elites who haven't paid theirs. Video: Fade to another picture of Obama giving State of the Union,	

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	superimposed 'Obama Aims $1.4 Trillion Tax Increase at Highest Earners (San Francisco Chronicle, Feb. 14, 2011).' Audio: He talks about budget and tax priorities, but passes a blind eye to nominees who don't contribute their fair share. Video: Cut to picture on left side of screen of Secretary of Treasury Timothy Geithner giving testimony, superimposed 'Geithner apologizes for not paying taxes (CBS News, Feb. 18, 2009.)' Audio: Call President Obama and tell him you don't approve of his taxing behavior. Video: Picture fades in on right side of screen of Tom Daschle, superimposed 'Tax Woes Derail Daschle's Bid for Health Chief (NPR, Feb. 3, 2009).' Fade to picture of President Obama and Michelle Obama enjoying themselves in Hawaii. (i) The FEC opined that the Ethics Television advertisement was not express advocacy because it did not contain any electoral references. <u>COORDINATED COMMUNICATIONS</u> 29. (a) An expenditure for a coordinated communication is treated as an in-kind contribution when "it is made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, a candidate's authorized committee, a political party committee, or their agents. 2 U.S.C. §§441a(a)(7)(B)(i); 11 C.F.R. §§109.20 to 109.23. Incorporated Section 501(c)(3) and 501(c)(4) organizations are prohibited from making in-kind contributions.	

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	(b) Expenditures by supporters of a candidate that are coordinated with the candidate are in effect "disguised contributions" that raise the same corruption concerns as direct contributions to the candidate. Buckley v. Valeo, 424 U.S. 1, 46-47 (1976) (per curiam). Congress can regulate coordinated expenditures as contributions to distinguish between "independent expressions of an individual's views and the use of an individual's resources to aid in a manner indistinguishable in substance from the direct payment of cash" to a candidate. H.R. Rep. No. 94-1057, at 59 (1976) (Conf. Rep.), reprinted in 1976 U.S.C.C.A.N. 946, 974; see also Shays v. Federal Election Commission, 528 F.3d 914, 919-20 (D.C. Cir. 2008) ("Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly, e.g., by asking a donor to buy air time for a campaign-produced advertisement."). (c) In McConnell v. FEC, 124 S. Ct. 619, 694 (2003), the United States Supreme Court upheld the constitutionality of FECA's coordinated communication rule for electioneering communications: "Buckley's narrow interpretation of the term 'expenditure' was not a constitutional limitation on Congress' power to regulate federal elections. Accordingly, there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." The prohibitions on contributions by corporations to candidates, and on in-kind contributions resulting from coordinated	

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	communications, remain intact after Citizens United. In light of the protections afforded electioneering communications and issue advocacy provided by Wisconsin Right to Life, this holding is open to challenge. See O'Keefe v. Schmitz, 2014 U.S. Dist. LEXIS 63066 (E.D. Wis. 2014) (criminal investigation of potential violations of Wisconsin's campaign finance laws by Section 501(c)(4) organization violated organization's First Amendment right to engage in issue advocacy; a candidate's promotion and support of issues advanced by an issue advocacy group in its effort to enhance its message through coordination does not give rise to quid pro quo corruption, which is the financial quid pro quo of dollars for political favors; "Issue advocacy money goes to the issue advocacy organization to provide issue advocacy speech. A candidate's coordination with and approval of issue advocacy speech, along with the fact that the speech may benefit his or her campaign because the position taken on the issues coincides with his or her own, does not give rise to the level of 'favors for cash.' Logic instructs that there is no room for a quid pro quo arrangement when the views of the candidate and the issue advocacy organization coincide.") (footnote omitted). (d) When a Section 501(c)(3) or 501(c)(4) organization directs grassroots lobbying to voters in a particular area, and refers to a political party or a clearly identified federal candidate, the organization's discussions with federal candidates regarding the grassroots lobbying can result in	

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	coordinated communications. (e) Super PACs that make independent expenditures in support of or in opposition to candidates seek to avoid coordinated communications. When a Super PAC makes a coordinated communication, the communication loses its status as an independent expenditure and results in an in-kind contribution to one or more candidates. The in-kind contribution is subject to FECA's contribution limitations and source restrictions. 30. (a) In FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999), the court set forth the elements of a coordinated communication. The Christian Coalition was a not-for-profit corporation that provided a "voice in the public arena for Christians and other 'people of faith.'" 52 F. Supp. 2d at 49. In the 1990, 1992, and 1994 elections, it supported a large number of Republican candidates for federal office. (b) The court held that "[c]oordination requires some to-and-fro between corporation and campaign" with respect to the corporation's electoral activity. 52 F. Supp. 2d at 93. Furthermore, contact between the candidate's campaign and the corporate organization was insufficient, by itself, to show coordination. It was important to allow the organization to discuss issues and policies with a candidate as part of the process of deciding whether the organization would support or oppose the candidate. Accordingly, the court held that coordination required contacts that involved an express	

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	request or suggestion from the candidate to the organization, or sufficiently "substantial discussion or negotiation" between the candidate and the organization to make the candidate and the organization "partners or joint venturers." 52 F. Supp. 2d at 92. (c) The discussion or negotiation had to focus on a communication's: (i) contents; (ii) timing; (iii) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (iv) volume (e.g., number of copies of printed materials or frequency of media spots). For example, discussion of which issues to include in a voter guide or scorecard, and how those issues were phrased (e.g., "homosexual rights" versus "human rights") would be coordination. As another example, if an organization's interpretation of the candidate's prior statements or votes would lead it to say the candidate "opposes" the issue, and the candidate tries to persuade the organization to use "supports" on the guide, that is coordination. 52 F. Supp. 2d at 92-93. See also Clifton v. Federal Election Commission, 114 F.3d 1309 (1st Cir. 1998) (FEC regulation impermissibly prohibited any oral communication between a candidate and Maine Right to Life, an organization preparing a voter scorecard listing, rating, and analyzing a legislator's votes). See generally Richard Briffault, "Coordination Reconsidered," 113 Columbia Law Review Sidebar 88 (2013) (available at http://www. columbialawreview.org/coordination-reconsidered_Briffault); Bradley A. Smith, "'Super PACs'	

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	and the Role of 'Coordination' in Campaign Finance Law," 50 Williamette Law Review 603 (2013). 31. (a) The FEC's regulations on coordinated communications largely follow the court's holdings in FEC v. Christian Coalition. The regulations consider whether an ad was sponsored at the "request or suggestion" of a candidate or political party; whether a candidate or political party was "materially involved" in the decisions on the content, audience, timing, or media chosen for the ad; and whether the ad was created after "substantial discussion" between the candidate or party and the ad's sponsor. Unlike FEC v. Christian Coalition, the regulations do not require a joint venture, or an agreement or formal collaboration. 11 C.F.R. §109.21(d)(1)-(3). (b) One commentator has criticized the regulations' approach as unrealistic: Candidates and committees don't have to talk to each other; they can communicate through the press. A candidate's committee can publicize campaign messages, themes, and strategies, and reach audiences the candidate's campaign would like to target, without sitting down with representatives of a supportive committee. This might have been a bit more cumbersome in 1999 when Christian Coalition was handed down, but surely today, with candidates, campaigns, parties, and political committees all maintaining Websites and Facebook pages, and campaign	

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	operatives posting their latest thoughts to their Twitter accounts, direct contacts between campaigns and outside groups are unnecessary: Why do they have to meet when they can tweet? [Richard Briffault, "Coordination Reconsidered," 113 Columbia Law Review Sidebar 88, 94 (2013) (available at http://www. columbialawreview.org/coordination-reconsidered_Briffault)] (c) To be a coordinated communication, the communication must satisfy a three-prong test: (i) the source of payment for the communication (the "payment prong"); (ii) the content and timing of the communication (the "content prong"); and (iii) the interaction between the person paying for the communication and the candidate, the candidate's campaign committee, the political party, or any agent thereof (the "conduct prong"). 11 C.F.R. §109.21(a). (d) Under the payment prong, an individual or entity other than the candidate, the candidate's campaign committee, or political party must pay for the communication in whole or in part. 11 C.F.R. §109.21(a)(1). This prong is satisfied when an individual or entity makes expenditures on behalf of a candidate. (e) Under the content prong, the communication must be a public communication, and satisfy one of five alternative standards. 11 C.F.R. §109.21(c). A public communication is a communication by means of any broadcast, cable, or	

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	satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public advertising. A mass mailing is a mailing by United States mail or facsimile of more than 500 pieces of mail of an identical or substantially similar nature within any thirty day period. A telephone bank is more than 500 telephone calls of an identical or substantially similar nature within any thirty day period. General public political advertising does not include communications over the Internet, except for communications placed for a fee on another person's Website. The placement of advertising for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, pop-up advertisements, and directed search results. 2 U.S.C. §431(22)-(24); 11 C.F.R. §§100.26 to 100.28; Preamble to Final Rules on Internet Communications, 71 F.R. 18,589,18,594 (April 12, 2006); MUR 6522 (Lisa Wilson-Foley for Congress) (coordinated communications do not result from Internet communications that are not placed for a fee on another person's Website; candidate did not make coordinated communications with three of her businesses through online advertising with YouTube videos, Facebook posts on the business' page promoting the business, and the candidate's and campaign committee's appearance on the business' Websites; all the posts were for free and none of the Internet advertising was placed for a fee on another person's Website); MUR 6477 (Super PAC Turn Right USA) (content prong does not apply to videos placed for free on the Internet); MUR 6414 (Russ	

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	Carnahan in Congress) (content prong does not apply to advertisement on Website). (f) The five alternative content standards are: (i) the public communication is an electioneering communication under 11 C.F.R. §100.29, which is a broadcast communication that mentions a federal candidate and is distributed to the applicable electorate thirty days before the primary election, or sixty days before the general election. 11 C.F.R. §109.21(c)(1); (ii) the public communication republishes, disseminates, or distributes in whole or in part at any time campaign materials prepared by a candidate or the candidate's campaign committee. 11 C.F.R. §109.21(c)(2); (iii) the public communication expressly advocates the election or defeat of a clearly identified federal candidate at any time. 11 C.F.R. §109.21(c)(3); (iv) (A) the public communication is made within ninety days before an election, and (I) refers to a clearly identified House or Senate candidate, and is publicly distributed in that candidate's jurisdiction; (II) refers to a political party, is coordinated with a House or Senate candidate, and is publicly distributed in that candidate's jurisdiction; or (III) refers to a political party, is coordinated with a political party, and is publicly distributed during a midterm election cycle; or (B) the public communication is made 120 days before a	

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	Presidential primary election through the general election, and (I) refers to a clearly identified Presidential or Vice Presidential candidate, and is publicly distributed in a jurisdiction before the clearly identified federal candidate's election in that jurisdiction; (II) refers to a party, is coordinated with a Presidential or Vice Presidential candidate, and is publicly distributed in that candidate's jurisdiction; or (III) refers to a political party, is coordinated with a political party, and is publicly distributed during the Presidential election cycle. 11 C.F.R. §109.21(c)(4); or (v) the public communication is the functional equivalent of express advocacy. A communication is the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate." 11 C.F.R. §109.21(c)(5). (g) The conduct prong has the following five alternative standards: (i) the communication is created, produced, or distributed at the request or suggestion of the candidate, the candidate's committee, political party committee, or any of their agents; or the communication is created, produced, or distributed at the suggestion of the person paying for the communication, and the candidate, the candidate's committee, political party committee, or any of their agents assents to the suggestion. 11 C.F.R. §109.21(d)(1); see also MUR 6668 (Jay Chen for	

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	Congress) (brother of candidate organized a Super PAC's mailers in support of candidate; Commission found that a familial relationship, by itself, is insufficient to trigger an investigation into coordination; use of a printer as a common vendor did not change the analysis when the printer only printed addresses onto the mailers and applied its bulk mail postmark); MUR 6368 (Friends of Roy Blount), Statement of Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther (Commission could not reach a decision and dismissed the MUR; founder of a Section 501(c)(4) organization appeared in a candidate's advertisement and campaigned with the candidate, but the complainant did not have any direct evidence that the founder had any nonpublic information provided by the campaign that tainted the independence of the Section 501(c)(4) organization's expenditures). (ii) the candidate, the candidate's committee, or political party committee is materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication. 11 C.F.R. §109.21(d)(2); (iii) the communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication or the employees or agents of that person and the candidate, the candidate's committee, the candidate's	

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	opponent or opponent's committee, a political party committee, or any of their agents. A discussion is substantial if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication. 11 C.F.R. §109.21(d)(3); (iv) the person paying for the communication employs a common vendor to create, produce, or distribute the communication, and the vendor (A) is currently providing services or provided services within the previous 120 days with the candidate or party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities, or needs of the candidate or political party committee, and (B) uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production, or distribution of the communication. 11 C.F.R. §109.21(d)(4); or (v) a person who has previously been an employee or independent contractor of a candidate's campaign committee or a political party committee during the previous 120 days uses or conveys information about the plans or needs of the candidate or political party committee to the person paying for the communication, and that information is material to the creation, production, or distribution of the communication.	

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	11 C.F.R. §109.21(d)(5). (h) A candidate's or political committee's response to an inquiry about that candidate's or party's positions on legislative or policy issues, which does not include discussion of campaign plans, projects, activities or needs, does not satisfy any of the conduct standards. 11 C.F.R. §109.21(f). This safe harbor permits organizations to make inquiries regarding a candidate's positions on policy issues and legislation. Organizations rely on this safe harbor in preparing voter guides and lobbying campaigns. See also O'Keefe v. Schmitz, 2014 U.S. Dist. LEXIS 63066 (E.D. Wis. 2014) (criminal investigation of potential violations of Wisconsin's campaign finance laws by Section 501(c)(4) organization violated organization's First Amendment right to engage in issue advocacy; a candidate's promotion and support of issues advanced by an issue advocacy group in its effort to enhance its message through coordination does not give rise to quid pro quo corruption, which is the financial quid pro quo of dollars for political favors; "Issue advocacy money goes to the issue advocacy organization to provide issue advocacy speech. A candidate's coordination with and approval of issue advocacy speech, along with the fact that the speech may benefit his or her campaign because the position taken on the issues coincides with his or her own, does not give rise to the level of 'favors for cash.' Logic instructs that there is no room for a quid pro quo arrangement when the views of the candidate and the issue advocacy	

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	organization coincide.") (footnote omitted). (i) Persons may use publicly available information in creating, producing or distributing a communication, and this use does not, by itself, satisfy four of the five conduct standards. This safe harbor does not apply to the "request or suggestion" conduct standard. To qualify for the safe harbor, the person paying for the communication must demonstrate that the information used in creating, producing, or distributing the communication was obtained from a publicly available source. Thus, a discussion between the political director of a Super PAC and a candidate regarding whether an advertisement on the candidate's position on immigration reform would be effective is coordination, but if the political director uses information from a news story, there is no coordination. See also FEC v. Christian Coalition, 52 F. Supp. 2d 45, 95 (D.D.C. 1999) (the fact that the Christian Coalition was singing from the same page on certain issues as the George H. W. Bush campaign does not by itself establish coordination). (j) When a commercial vendor, former employee, or political committee establishes and uses a firewall to prevent the sharing of information about the candidate or political party's plans, projects, activities or needs, the conduct standards of 11 C.F.R. §109.21(d) will not be satisfied. To qualify for the safe harbor, the firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy. The firewall must be designed	

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	and implemented to prohibit the flow of information between: (i) employees or consultants providing services for the person paying for the communication; and (ii) those currently or previously providing services to the candidate, the candidate's committee, the candidate's opponent, the opponent's committee, or a political party committee. If there is specific information that is material to the creation, production, or distribution of the communication used by or conveyed to the person paying for the communication, the firewall does not provide a defense. 11 C.F.R. §109.21(h). The FEC does not require firewalls and will not draw a negative inference from the absence of firewalls. An example of an acceptable firewall is found in MUR 5506 (EMILY's List), First General Counsel's Report at 6-7. The firewall prohibited personnel who worked directly with candidate committees from discussing and transmitting material information to the staff who handled the advertising buys for those candidates. (k) The conduct standard for former employees and independent contractors of a candidate's committee or political party no longer applies after 120 days. Therefore, a senior member of a candidate's staff can leave the staff on April 1 of a two-year election cycle, and by August 1 of the same year that person's status as a former employee no longer makes a difference. That person can then become the political director of a Super PAC that primarily supports that candidate, or that supports a broad range of candidates.	

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	(l) Within the 120 day period after leaving a candidate committee or political party, status as a former employee or as a common vendor by itself is insufficient to satisfy the conduct standard. The former employee or common vendor must use or convey nonpublic inside information from the candidate's campaign regarding the campaign's plans or needs to the organization paying for the ads. If the candidate's committee goes public with this information, such as by posts on the Internet or social media, the content standard is not satisfied. Moreover, the candidate committee's public request of support from independent groups also means that the content standard is not satisfied. (m) One commentator has criticized the prohibition on the use of common vendors and former employees: [T]he specific limitation on the use of vendors and former employees is indefensible under Buckley. The theory needed to support such a prophylactic is that common vendors and former employees serve as go-betweens or agents, representing the parties in the type of quid-pro-quo bargaining Buckley held could be limited. In fact, there is no evidence that vendors or former employees are particularly utilized as agents to negotiate quid-pro-quo arrangements. To the extent they might be, actions by agents are already included in determining what conduct is prohibited for coordination purposes. A bribe is a bribe whether negotiated directly by the parties or by agents representing their interests, so there is no reason to single out vendors and	

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	former employees for special treatment. Indeed, vendors are particularly poor choices for such a role, given that campaign disbursements to a vendor must be disclosed pursuant to the Act. The trail to the vendor is immediately obvious. A former employee of the candidate currently in the open employ of the independent speaker would seem only a marginally less disastrous choice as the go-between for a corrupt bargain. . . . . It cannot be said that the mere presence of the candidate's former associates, staff, or current supporters working with a Super PAC creates an opportunity for bargaining the quid-pro-quo. To use Professor Briffault's example, Mr. Spies working for Restore Our Future is no more bargaining with the candidate or his agents than Mr. Spies working for a different Super PAC that spends nothing to support Mr. Romney. No bargaining opportunities arise unless he has contact wit the campaign or candidate post-Super PAC employment. It is his present conduct, not his past position or conduct, that can be regulated in the interest of preventing corruption. It is possible, of course, that a candidate may issue instructions to a former aide – "please establish a Super PAC and make expenditures on my behalf. You will be rewarded with government favors and subsidies for your clients." And one might find such prophylactic tempting. But the candidate can equally do that with someone he has never met, or at least someone who has never worked closely	

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	with the candidate. While some leeway may be allowed for "the appearance of corruption," the system cannot operate on the assumption that all prior contact with a candidate is suspicious, and therefore disqualifies a would be speaker from the right to make expenditures. Such a presumption would allow the exception granted by Buckley to regulated coordinated activity to swallow the rule protecting independent speech. [Bradley A. Smith, "'Super PACs' and the Role of 'Coordination' in Campaign Finance Law," 50 Williamette Law Review 603, 628-29, 632-33 (2013)] (n) For a single-candidate Super PAC, the content standard is rarely at issue, and the conduct standard is often at issue. For Super PACs that support a broad range of candidates, both the content standard and the conduct standard are often at issue. (o) Formal agreement or collaboration between the person paying for the communication and the candidate, the candidate's committee, political party committee, or any of their agents is not required for a coordinated communication. 11 C.F.R. §109.21(e). (p) To be an agent of a candidate, candidate's committee, or political party committee, a person must have actual authorization, either express or implied, from a specific principal to engage in specific activities, and then engage in those activities on behalf of that specific principal. These activities would also result in a coordinated communication if	

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	carried out directly by the candidate, the candidate committee's staff, or a political party official. 11 C.F.R. §109.3(a) and (b). (q) An expenditure made to distribute or republish in whole or in part campaign material produced or prepared by a candidate's campaign is an in-kind contribution to that candidate. 2 U.S.C. §441a(a)(7)(B)(iii); 11 C.F.R. §109.23(a). See also MUR 6667 (House Majority PAC & Friends of Cheri Bustos for Congress) and MUR 6617 (Christie Vilsack for Iowa), Statement of Reasons of Commissioners Caroline C. Hunter and Matthew S. Petersen (two of four commissioners found no violation of the republication prohibition when an independent expenditure group incorporated footage of the candidate from the campaign's ad into the group's commercial when the commercial had its own message; candidate's footage took up eleven seconds of group's thirty-three second commercial; critical issue is whether the independent expenditure group's message is distinct from the candidate's message, or whether it repeats verbatim the candidate's message); MUR 6357 (American Crossroads), Statement of Reasons of Chair Caroline Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen (Super PAC can use snippets of a campaign's publicly available "B roll" footage as long as the Super PAC's ad does not repeat the content, format, and overall message of the candidate's ad; Super PAC does not republish candidate's ad when the Super PAC adds its own text, graphic, audio, and narration that causes the ad to	

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	become the Super PAC's message; fact that the Super PAC's ad and the campaign's ad promote the same themes is not materially significant; only if the Super PAC's ad is close to a carbon copy of the candidate's ad does the Super PAC run afoul of the prohibition on republication). See generally Ashley Parker, "Viral Video Turns Senator Into a Silent Comedy Star," The New York Times, March 17, 2014, at A14 ("When Senator Mitch McConnell's re-election campaign released two-and-a-half minutes of video footage featuring him wordlessly smiling, it was most likely hoping to provide a friendly 'super PAC' with high-quality images of Mr. McConnell to use in ads. . . . Because campaigns are legally prohibited from coordinating with super PACs, they are increasingly publishing what is known as B-roll footage of their candidates, which is available for public consumption, including for use by outside groups."). (r) The FEC regulations contain the following exceptions to the prohibition on distribution or republication of materials prepared by a candidate's campaign: (i) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material; (ii) The campaign material is disseminated , distributed, or republished in a news story, commentary, or editorial exempted under 11 C.F.R. §100.73 or 11 C.F.R. §100.132; (iii) The campaign material used consists of a brief quote of	

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	materials that demonstrate a candidate's position as part of a person's expression of its own views; or (iv) A national political party committee or a state or subordinate political party committee pays for the dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 C.F.R. §109.32. 11 C.F.R. §109.23(b). (s) The FEC regulations contain the following safe harbor to protect bona fide business communications from treatment as coordinated communications. Public communications that refer to a clearly identified federal candidate in that person's capacity as the owner or operation of a business that existed before that person became a candidate, and that do not promote, attack, support, or oppose that candidate or an opponent for the same office, are not coordinated communications. In addition, the communication must be consistent with other public communications made by the business before the person became a candidate with respect to the medium, timing, content, and geographic distribution of the communication. 11 C.F.R. §109.21(i). 32. The creation and broadcast by EchoStar Satellite LLC, a pay-TV satellite service, of public service announcements featuring members of Congress soliciting funds for charitable organizations came within the charitable solicitation exception to the definition of coordinated communication when (a) a federal candidate solicits funds for organizations	

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	described in Code Section 501(c) that have applied for or been granted tax-exempt status; (b) the solicitation is a general solicitation for a Section 501(c) organization that does not engage in activities with respect to an election, or the organization's principal purpose is not to conduct election activity and the solicitation is not to obtain funds for activities in connection with an election; (c) the announcement will not be distributed more than ninety days before the candidate's election, or will not be publicly distributed within the candidate's jurisdiction; (d) the announcement does not promote, support, attack, or oppose the candidates participating the announcements; and (e) the announcement does not contain campaign materials, expressly advocate the election or defeat of a clearly identified federal candidate, refer to any political party, election, or campaign, or solicit any contributions for a political campaign or political committee. FEC Advisory Opinion No. 2006-10. 33. The Palm Springs Desert Resorts Convention and Visitors Authority, an unincorporated organization that promoted tourism from Los Angeles and Orange Counties, would not make a coordinated communication in the following situation. Representative Mary Bono would serve as its spokesperson and host of a thirty minute infomercial to be aired for eight months when the infomercial would not: (a) be received by 50,000 or more persons in Representative Bono's district; (b) disseminate, distribute, republish, in whole or in part, campaign materials prepared by Representative Bono,	

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	her authorized committee, or their agents; (c) expressly advocate the election or defeat of Representative Bono or any other federal candidate; and (d) be broadcast in Representative Bono's district within ninety days of the general election. FEC Advisory Opinion No. 2006-29. 34. (a) In McMullen v. Committee for Justice and Fairness, 2013 Vt. Super. LEXIS 2 (Jan. 28, 2013) (Mello, J.), the court applied Vermont's coordination statute to determine whether a political action committee's television and direct mail advertisements during the 2012 Democratic primary campaign for Vermont Attorney General coordinated expenditures. (b) Jack McMullen was the Republican candidate for Vermont Attorney General in the 2012 election. The Committee for Justice and Fairness ("CJF") was a PAC based in Washington, D.C. that received contributions from the Democratic Attorneys General Association. CJF spent $194,080.75 on a television advertisement and direct mail advertisements in support of Democratic candidate William Sorrell shortly before the Vermont primary election in late August. Sorrell is a member of the Democratic Attorneys General Association, and did not report any contributions to his campaign from CJF. (c) Former Governor Howard Dean narrated the television advertisement for CJF. The ad showed two images of Dean and Sorrell standing side by side in front of a podium. Dean	

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	says: They sold dishonest mortgages, and illegally foreclosed on peoples' homes. But when the big banks tried to get away with it, one man in Vermont held them accountable. Attorney General Bill Sorrell cracked down on deceptive bankers and won millions in relief for homeowners. He's fought to stop predatory lenders and protected seniors from scams. I'm proud to call Bill Sorrell my friend, but more proud to call him Vermont's Attorney General. (d) On July 19, 2012, prior to narrating the advertisement, Dean conducted a joint press conference with Sorrell at Burlington City Hall at which Dean formally endorsed Sorrell's candidacy. The images of Dean standing with Sorrell used in the television advertisement appear to have been taken at this event. Sorrell served as the Secretary of Administration under Governor Dean from 1992-97. Dean appointed Sorrell to the position of Attorney General in 1997. (e) In August, apparently after the television advertisement first aired, Dean narrated a radio advertisement endorsing Sorrell's candidacy. The radio advertisement was paid for by Sorrell's campaign. (f) Under Vermont statute, "any expenditure intended to promote the election of a specific candidate . . . if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee" is a related,	

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	or coordinated, campaign expenditure. 17 V.S.A. §2809(c). (g) McMullen alleged that Governor Dean, acting as an agent of the Sorrell campaign, narrated the television advertisement and consulted with CJF about how and where it should be placed in the Vermont media market. He argued that the Sorrell campaign, acting through Dean, facilitated, solicited, and approved CJF's expenditures on Sorrell's behalf. (h) The court found that McMullen did not produce any evidence that the Sorrell campaign consented to Dean acting on its behalf, or that the Sorrell campaign had control over Dean's actions with respect to the television advertisement produced by CJF. There was no evidence that Dean was compensated for his actions on Sorrell's behalf, or that confidential information was shared with Dean and CJF to create or target the television advertisement. Dean assisted CJF to create a television advertisement for a friend and former colleague whose campaign he endorsed, but that does not prove that he was acting as an agent of Sorrell or his campaign. The fact that Sorrell paid for the radio advertisement narrated by Dean is suggestive that Sorrell also may have been somehow involved in facilitating the CJF television advertisement narrated by Dean, but it is not evidence that such coordination actually took place. Finally, there was no evidence that Sorrell or his campaign even knew about the television advertisement prior to its first airdate. Cf. State v. Republican Governors Association, No. 762-12-11 Wncv (Vt. Super. Ct. Sept. 26, 2012) (allegations	

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	that Republican gubernatorial candidate Brian Dubie's campaign used its confidential polling data to inform its campaign decisions, then shared the confidential polling data with the Republican Governors Association, if proven, would amount to facilitation). 35. (a) Under California law, an independent expenditure committee is presumed to make a contribution to a candidate, and not an independent expenditure, when the committee and candidate share an agent who provides the candidate with professional services related to campaign or fundraising strategy. (b) Under this rule, the California Fair Political Practices Commission found that an independent expenditure committee falsely reported an over-the-limit contribution to a candidate as an independent expenditure. (c) Voters for a New California purported to be a general purpose committee that made independent expenditures to support Latino candidates. Joaquin Ross was a principal officer of the committee, and at the same time was a paid general campaign manager for Luis Alejo, a successful candidate for the California State Assembly. In approximately May 2010, Voters for a New California and Joaquin Ross made an over-the-limit nonmonetary contribution in support of Luis Alejo's candidacy for the California State Assembly in the form of three mass mailings, which cost approximately $28,892. They also filed	

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	a false Form 460 campaign statement with the Secretary of State for the reporting period ending May 22, 2010, which concealed the over-the-limit contribution by falsely reporting it as an independent expenditure. The Commission imposed a $6,500 fine. California Fair Political Practices Commission Enforcement Decisions: April 25, 2013 (available at http://www.fppc.ca.gov/print.php?prid=772). 36. (a) In Advisory Opinion 437 (Feb. 11, 2014), the Minnesota Campaign Finance & Public Disclosure Board addressed whether a candidate's participation in fundraising efforts of an independent expenditure political committee, or in the promotion of the committee, constitutes cooperation or implied consent that destroys the independence of an expenditure that the committee later makes to influence the candidate's election. (b) Minnesota statute defined "independent expenditure" as follows: "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly defined candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. [Minn. Stat. §10A.01, subd. 18] (c) In the Advisory Opinion, the Board addressed the "without the cooperation" and "without the implied consent"	

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	prongs of the definition of independent expenditure. (d) The Board cast a wide net as to the conduct that constitutes cooperation: [T]he Board concludes that acting in cooperation is established if it is shown that there was active participation by the candidate in at least one of the various processes or activities that are undertaken to make an expenditure. The facts of the request suggest a close relationship between the Candidate and the IEPC. A candidate will not be approached by an independent expenditure political committee to engage in fundraising unless the candidate's expressed values and goals are consistent with those of the political committee. Conversely, a candidate would not consider engaging in fundraising for a political committee whose values and goals were contrary to those of the candidate. It is this very alignment of values and goals that makes it possible, perhaps likely, that the IEPC would decide to engage in independent expenditure communications to affect the Candidate's election. If the IEPC does engage in independent expenditure communications to affect the Candidate's election, the Candidate's cooperation in the IEPC's fundraising will have helped make those communications possible. This point may give rise to an argument that the IEPC can establish two accounts so that it is not money raised by *this* candidate, but *other* money that is used to influence this	

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	candidate's nomination or election. This argument has been rejected by the Board in other contexts, as the Board has long declined to recognize the separation of general treasury money into segregated accounts for reporting or other purposes. An independent expenditure political committee is a unique form of political committee in that it engages only in making independent expenditures to influence candidate elections. Thus, any cooperation with an independent expenditure political committee is an effort in support of those expenditures. Allowing a candidate to solicit contributions to an independent expenditure political committee therefore defeats the purpose of the independent expenditure statutes: to insure that independent expenditures are, in fact, completely independent of the candidate. Similarly, permitting candidates to solicit contributions to an independent expenditure political committee that then makes expenditures for that same candidate would provide a way for contributors to circumvent the limits on contributions to a candidate and for candidates to circumvent the limits on campaign expenditures agreed to by most candidates. An independent expenditure political committee is also unique in that it is the only type of association that is permitted, without restriction or limit, to accept corporate contributions to influence candidate elections. Corporations are not permitted to donate directly or indirectly to candidates	

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	and candidates are not permitted to accept contributions from corporations. Yet for some IEPCs, corporations are their largest source of money. To permit a candidate to solicit corporate contributions to an independent expenditure political committee that, in turn, makes an expenditure to influence the election of that same candidate would provide a simple mechanism for corporations to directly support candidates while avoiding the prohibition on direct or indirect contributions to candidates by making a technical claim of independence. Based on the above analysis, the Board concludes that fundraising for, or promotion of, an IEPC constitutes cooperation that destroys the independence of any subsequent expenditures made by the IEPC to affect the Candidate's election. Thus, an IEPC is prohibited from making expenditures for a candidate who participates in fundraising for or promotion of that same IEPC. (e) The Board also found that the candidate's participation showed the candidate's implied consent to the expenditure: By the act of participating in the political committee's operations through fundraising and/or promoting the political committee through participation at events the candidate is impliedly consenting to the political committee's actions. If those actions include making expenditures for that same candidate, the candidate's implied consent extends [to] the making of those expenditures which, as a result, will not be	

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	independent expenditures. (f) Finally, the Board found that when the Candidate promotes the IEPC without the solicitation of funds, the level of cooperation is still sufficient to defeat the independence of any subsequent expenditure to promote the election of the Candidate.	

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
STATUTORY AND REGULATORY PROVISIONS ON CONTRIBUTIONS TO AND FUNDRAISING FOR SECTION 501(c)(3) ORGANIZATIONS		
	1. (a) A national, state, district, or local committee of a political party, including a national congressional campaign committee, or any entity established, financed, or controlled by a party committee, or any officer or agent acting on behalf of a party committee, cannot solicit funds for or make or direct any donations to an organization exempt from tax under I.R.C. §501(c), if the organization makes expenditures or disbursements in connection with an election for federal office, including without limitation expenditures or disbursements for federal election activity. 2 U.S.C. §441i(d); 11 C.F.R. §§300.11, 300.37, 300.50, and 300.51. Paragraph 2 discusses the definitions of solicitation and direct. (b) Federal election activity means: (i) voter registration activity in the 120 days before a regularly scheduled federal election; (ii) voter identification, get-out-the-vote activity, and generic campaign activity in connection with an election in which a federal candidate is on the ballot; (iii) public communications that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office, regardless of whether the communications expressly advocate a vote for or against a candidate; or (iv) services by a state or local party employee who spends more than 25% of paid time in a month on activities in connection with a federal election. 2 U.S.C. §431(20)(A). Subparagraph (d) discusses the definition of generic campaign activity; subparagraphs (e)-(f) discuss the	1. No statutory or regulatory provisions. 2. In T.A.M. 200044038 (Nov. 3, 2000), the IRS applied the general statutory and regulatory provisions against campaign intervention to fundraising letters sent out on the joint letterhead of a Section 501(c)(3) organization and a candidate, which were signed only by the candidate: In summary, the content and the timing of the letter in question constitute prohibited political campaign intervention. Statements made in the letters supported A's [the candidate's] political agenda and criticized the opposing candidate. The letters were sent during the period of A's primary election as well as the general election up to Oct. 4, 1996. There were also mailings in July and August of 1996 and three mailings in September of 1996. The total of all letters were sent to 2.7 million addresses, many of recipients of such statements could be assumed to be eligible voters in the up-coming election in that the election was a national election as opposed to a district or state-wide election. As stated earlier, A's signature of the letter is the most determinative factor as to political campaign intervention. It represents a forum for A to present positive aspects of his candidacy and negative aspects of his opponent. Accord, T.A.M. 9609007 (March 1, 1996). See discussion of joint fundraising by a Section 501(c)(3) organization and a PAC in Paragraphs 20 and 21 of the I.R.C. column for

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	definition of voter registration activity; subparagraphs (g)-(h) discuss the definition of get-out-the-vote activity; subparagraph (i) discusses the exceptions to the definition of voter registration activity and get-out-the-vote activity; subparagraph (j) discusses the exception to the definition of federal election activity and get-out-the-vote activity conducted in connection with a nonfederal election; subparagraph (k) discusses the exception to the definition of federal election activity for the activities of state, district, and local party committees, and associations of state and local candidates that involve de minimis costs; subparagraph (l) discusses the definition of voter identification; subparagraph (m) discusses the definition of "in connection with an election in which a candidate for federal office appears on the ballot," and subparagraph (n) discusses the definition of public communication. (c) In McConnell v. FEC, 124 S. Ct. 619, 678-80 (2003), the United States Supreme Court upheld the prohibition on solicitation of contributions to Section 501(c) organizations against constitutional attack. The Court held that the "solicitation restriction is closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates." 124 S. Ct. at 679. The Court also held that to avoid constitutional problems, it would construe the prohibition on making or directing contributions to the specified Section 501(c) organizations to permit political parties "to make or direct donations of money to any tax-	"Regulatory Provisions On Contributions, Expenditures, And Electioneering." 3. The IRS has privately ruled that a Section 501(c)(3) public charity can solicit funds with the assistance of a United States Senator and Congressman without engaging in prohibited campaign intervention. The public charity was a research and educational institution organized to promote public policies based on free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. As part of its direct mail program, the public charity proposed sending out two fundraising letters that requested the recipient to make a contribution and complete a short survey. One letter was on the Senator's letterhead, and the other letter was on the public charity's letterhead. The Senator signed the first letter, and the Congressman signed the second letter. The Senator and Congressman were candidates for re-election, and the public charity will not send the letters to recipients residing in the state that the Senator represented, nor to recipients residing in the district that the Congressman represented. In addition, the public charity will not make responses to the surveys available to the Senator and Congressman. Furthermore, nothing in the fundraising letters suggests or encourages the recipient to make a contribution to the candidate. The IRS ruled that the fundraising letters would not constitute prohibited campaign intervention. PLR 200602042. Cf. T.A.M. 2000-44-038 (July 24, 2000)

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	exempt organization that has otherwise been raised in compliance with FECA." 124 S. Ct. at 682. (d) Generic campaign activity means a campaign activity that promotes or opposes a political party, and does not promote a federal or nonfederal candidate. 2 U.S.C. §431(21). (e) The FEC has issued regulations defining "voter registration activity" to cover activities that assist, encourage, or urge potential voters to register to vote. The following activities are voter registration activities: (i) encouraging or urging potential voters to register to vote, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks, and messaging such as SMS and MMS), or by any other means; (ii) preparing and distributing information about registration and voting; (iii) distributing voter registration forms or instructions to potential voters; (iv) answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing voter registration forms; (v) submitting or delivering a completed voter registration	(public charity described in PLR 200602042 sent out fundraising letters signed by Presidential candidate Bob Dole; letters solicited funds and support for the Republican party, and were distributed shortly before the 1996 presidential election; IRS found prohibited campaign intervention).

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
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	form on behalf of a potential voter; (vi) offering or arranging to transport, or actually transporting, potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or (vii) any other activity that assists potential voters to register to vote. 11 C.F.R. §100.24(a)(2)(i). (f) Examples of voter registration activity are: (i) sending a mass mailing of voter registration forms; and (ii) submitting completed voter registration forms to the appropriate state or local office handling voter registration. (g) The FEC has issued regulations defining "get-out-the vote activity" as activities that assist, encourage, or urge potential voters to vote. The following activities are get-out-the vote activities: (i) encouraging or urging potential voters to vote, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks, and messaging such as SMS and MMS), or by any other means; (ii) informing potential voters, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks, and messaging such	

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	as SMS and MMS), or by any other means, about the hours and location of polling places, or about early voting or voting by absentee ballot; (iii) offering or arranging to transport voters to the polls, as well as actually transporting voters to the polls; and (iv) all other activities that assist potential voters in voting. 11 C.F.R. §100.24(a)(3)(i). (h) Examples of get-out-the-vote activity are: (i) driving a sound truck through a neighborhood that plays a message urging listeners to "Vote next Tuesday at the Main Street community center;" and (ii) making telephone calls, including robocalls, reminding the recipient of the times during which the polls are open on election day. (i) The regulations contain exceptions to the definition of voter registration activity and get-out-the-vote activity for a brief exhortation to register to vote, or to vote, as long as the exhortation is incidental to a communication, activity, or event. 11 C.F.R. §100.24(a)(2)(ii) and (a)(3)(ii). The following examples show the application of this exception: (i) a mailer praises the public service record of mayoral candidate X or discusses his campaign platform. The mailer concludes by reminding recipients, "Don't forget to register to vote for X by October 1st." The exception applies. 11 C.F.R. §100.24(a)(2)(ii)(A).	

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	(ii) a phone call for a State party fundraiser gives listeners information about the event, solicits donations, and concludes by reminding listeners, "Don't forget to register to vote." The exception applies. 11 C.F.R. §100.24(a)(2)(ii)(B). (iii) A mailer praises the public service record of mayoral candidate X or discusses his campaign platform. The mailer concludes by reminding recipients, "Vote for X on November 4th." The exception applies. 11 C.F.R. §100.24(a)(3)(ii)(A). (iv) A phone call for a State party fundraiser gives listeners information about the event, solicits donations, and concludes by reminding listeners, "Don't forget to vote on November 4th." The exception applies. 11 C.F.R. §100.24(a)(3)(ii)(B). (v) Exhortations to register to vote, or to vote, that consume several minutes of a speech, or that occupy a large amount of space on a mailer, are not brief and will not qualify for the exception. Preamble to Definition of Federal Election Activity, 75 F.R. 55,257, 55,261, 55, 263-64 (Sept. 10, 2010). (vi) A message in a mailer that stated only "Register to Vote by October 1st!" or "Vote on Election Day!" with no other text would not be incidental and would not satisfy the	

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	exception. Id. (j) The regulations also contain an exception to the definition of federal election activity for voter identification activity and get-out-the-vote activity conducted in connection with a nonfederal election. The exception applies to any amount expended or disbursed by a state, district, or local party committee for: (i) voter identification that is conducted solely in connection with a nonfederal election held on a date on which no federal election is held, and that is not used in a subsequent election in which a federal candidate is on the ballot; and (ii) get-out-the-vote activity that is conducted solely in connection with a nonfederal election held on a date on which no federal election is held, and any communications made as part of the activity refer exclusively to: (A) nonfederal candidates participating in the nonfederal election if the nonfederal candidates are not also federal candidates; (B) ballot referenda or initiatives scheduled for the date of the nonfederal election; or (C) the date, polling hours, and locations of the nonfederal election. 11 C.F.R. §100.24(c)(5)-(6). (k) The regulations also contain an exception to the definition of federal election activity for the following activities of state, district, and local party committees, and associations of state and local candidates that involve de	

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	minimis costs: (i) on the Website of a party committee or association of state or local candidates, posting a hyperlink to a state or local election board's web page containing information on voting or registering to vote; (ii) on the Website of a party committee or association of state or local candidates, enabling visitors to download a voter registration form or absentee ballot application; (iii) on the Website of a party committee or association of state or local candidates, providing information about voting dates or polling locations and hours of operation; and (iv) placing voter registration forms or absentee ballot applications obtained from the board of elections at the office of a party committee or association of state or local candidates. 11 C.F.R. §100.24(c)(7). (l) The FEC has issued regulations defining "voter identification" as "acquiring information about potential voters, including, but not limited to, obtaining voter lists and creating or enhancing voter lists by verifying or adding information about voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates." 11 C.F.R. §100.24(a)(4). (m) The FEC has issued regulations defining "in connection	

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	with an election in which a candidate for federal office appears on the ballot" as follows: (i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for federal candidates as determined by state law, or in those states that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff. (ii) The period beginning on the date on which the date of a special election in which a candidate for federal office appears on the ballot is set and ending on the date of the special election. 11 C.F.R. §100.24(a)(1)(i)-(ii). (n) A public communication is a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public advertising. A mass mailing is a mailing by United States mail or facsimile of more than 500 pieces of mail of an identical or substantially similar nature within any thirty day period. A telephone bank is more than 500 telephone calls of an identical or substantially similar nature within any thirty day period. General public political advertising does not include communications over the Internet, except for communications placed for a fee on another person's Website. The placement of advertising for a fee includes all potential forms of advertising, such as	

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	banner advertisements, streaming video, pop-up advertisements, and directed search results. 2 U.S.C. §431(22)-(24); 11 C.F.R. §§100.26 to 100.28; Preamble to Final Rules on Internet Communications, 71 F.R. 18,589, 18,594 (April 12, 2006). (o) A party committee can establish that the Section 501(c) organization does not make expenditures or disbursements in connection with federal elections by obtaining a signed certification from an authorized representative of the organization that within the current election cycle the organization has not made, and does not intend to make, expenditures or disbursements in connection with an election for federal office (including for federal election activity), and that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for federal office (including for federal election activity) in a prior election cycle. 11 C.F.R. §§300.11(c)-(d) and 300.37(c)-(d). 2. The FEC has issued regulations defining solicit and direct in 11 C.F.R. §300.2(m)-(n) as follows: (a) To solicit means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a	

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	clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication. A solicitation does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation. (i) The following types of communications constitute solicitations: (A) A communication that provides a method of making a contribution or donation, regardless of the communication. This includes, but is not limited to, providing a separate card, envelope, or reply device that contains an address to which funds may be sent and allows contributors or donors to indicate the dollar amount of their contribution or donation to the candidate, political committee, or other organization. (B) A communication that provides instructions on how or where to send contributions or donations, including providing a phone number specifically dedicated to facilitating the making of contributions or donations. However, a communication does not, in and of itself, satisfy the definition of "to solicit" merely because it includes a mailing address or phone number that is not specifically dedicated to facilitating the making of contributions or	

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	donations. (C) A communication that identifies a Web address where the Web page displayed is specifically dedicated to facilitating the making of a contribution or donation, or automatically redirects the Internet user to such a page, or exclusively displays a link to such a page. However, a communication does not, in and of itself, satisfy the definition of "to solicit" merely because it includes the address of a Web page that is not specifically dedicated to facilitating the making of a contribution or donation. (ii) The following statements constitute solicitations: (A) "Please give $100,000 to Group X." (B) "It is important for our State party to receive at least $100,000 from each of you in this election." (C) "Group X has always helped me financially in my elections. Keep them in mind this fall." (D) "X is an effective State party organization; it needs to obtain as many $100,000 donations as possible." (E) "Giving $100,000 to Group X would be a very smart idea." (F) "Send all contributions to the following address* * *."	

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	(G) "I am not permitted to ask for contributions, but unsolicited contributions will be accepted at the following address* * *." (H) "Group X is having a fundraiser this week; you should go." (I) "You have reached the limit of what you may contribute directly to my campaign, but you can further help my campaign by assisting the State party." (J) A candidate hands a potential donor a list of people who have contributed to a group and the amounts of their contributions. The candidate says, "I see you are not on the list." (K) "I will not forget those who contribute at this crucial stage." (L) The candidate will be very pleased if we can count on you for $10,000." (M) "Your contribution to this campaign would mean a great deal to the entire party and to me personally." (N) Candidate says to potential donor: "The money you will help us raise will allow us to communicate our message to the voters through Labor Day." (O) "I appreciate all you've done in the past for our party in	

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	this State. Looking ahead, we face some tough elections. I'd be very happy if you could maintain the same level of financial support for our State party this year." (P) The head of Group X solicits a contribution from a potential donor in the presence of a candidate. The donor asks the candidate if the contribution to Group X would be a good idea and would help the candidate's campaign. The candidate nods affirmatively. (iii) The following statements do not constitute solicitations: (A) During a policy speech, the candidate says: "Thank you for your support of the Democratic Party." (B) At a ticket-wide rally, the candidate says: "Thank you for your support of my campaign." (C) At a Labor Day rally, the candidate says: "Thank you for your past financial support of the Republican Party." (D) At a GOTV rally, the candidate says: "Thank you for your continuing support." (E) At a ticket-wide rally, the candidate says: "It is critical that we support the entire Democratic ticket in November." (F) A Federal officeholder says: "Our Senator has done a great job for us this year. The policies she has vigorously promoted in the Senate have really helped the economy of	

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	the State." (G) A candidate says: "Thanks to your contributions we have been able to support our President, Senator and Representative during the past election cycle." (b) To direct means to guide, directly or indirectly, a person who has expressed an intent to make a contribution, donation, transfer or funds, or otherwise provide anything of value, by identifying a candidate, political committee or organization, for the receipt of such funds, or things of value. The contribution, donation, transfer, or thing of value may be made or provided directly or through a conduit or intermediary. Direction does not include merely providing information or guidance as to the applicability of a particular law or regulation. 3. The prohibition in Paragraph 1 becomes a problem for Section 501(c)(3) organizations when unscrupulous party officials direct private persons and entities to make contributions to the organizations to conduct voter registration and get-out-the-vote drives, candidate debates, and other nonpartisan activities. 4. (a) A federal candidate or officeholder can make a general solicitation, without limits on the source or amount of funds, on behalf of any organization that is described in I.R.C. §501(c), other than an organization whose principal purpose is to conduct voter registration activities within 120 days of	

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	an election, or voter identification, get-out-the-vote, or generic campaign activity in connection with an election in which a candidate for federal office is on the ballot. 2 U.S.C. §441i(e)(4)(A); 11 C.F.R. §§300.52(a) and (c), and 300.65(a) and (c). A general solicitation does not specify how the funds will or should be spent. Id. (b) The provisions on general solicitation by federal candidates and officeholders do not limit the ability of Section 501(c)(3) organizations to use the funds so raised for otherwise permissible federal election activity. 5. When a Section 501(c)(3) organization raised funds for scholarships for Hispanic students living in El Paso, Texas to pursue undergraduate degrees, and the scholarship recipients did not engage in any activity in connection with a federal or nonfederal election as part of, or in exchange for, the scholarship, the funds raised and spent by the Section 501(c)(3) organization were not in connection with a federal or nonfederal election under 2 U.S.C. §441i(e)(1)(A)-(B). Accordingly, Representative Silvestre Reyes, whose Congressional district included most of El Paso, and for whom the scholarship was named, could sign written solicitation letters on the Section 501(c)(3) organization's stationery. In addition, the amount he could solicit for the scholarship was not limited by FECA nor subject to its reporting requirements. FEC Advisory Opinion No. 2003-20.	

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	6. The absence of campaign activity was an important factor in determining that an officeholder's appearance in a public service announcement would not be a solicitation of funds subject to FECA in FEC Advisory Opinion No. 2004-14. A Congressman, Tom Davis of the Eleventh District of Virginia, planned to appear in a public service announcement to benefit the National Kidney Foundation to promote the Cadillac Invitational Golf Tournament. The announcement would air on cable systems in Northern Virginia, including the Eleventh District. The tournament was strictly a charitable fundraising event held annually to benefit the Foundation, and the Foundation did not engage in any activity in connection with an election. The announcement would not expressly advocate the Congressman's election, make any reference to his candidacy, nor would any signs, banners, or activities related to his campaign be visible. The Foundation was responsible for the creation of the announcement, and the Congressman's office would pay for taping the announcement. The airtime was donated by the cable broadcasting station. The FEC opined that the Congressman's appearance would not be a solicitation of funds in connection with an election subject to FECA. FEC Advisory Opinion No. 2004-14. 7. (a) A federal candidate or officeholder can make a specific solicitation for a Section 501(c) organization to conduct the federal election activities described in Paragraph 1(b)(i)-(ii),	

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	or for a Section 501(c) organization whose principal purpose is to conduct these activities, if the candidate or officeholder makes the solicitation only to individuals, and does not solicit more than $20,000 from any individual during a calendar year. 2 U.S.C. §441i(e)(4)(B); 11 C.F.R. §§300.52(b)-(c) and 300.65(b)-(c). A federal candidate or officeholder cannot make solicitations on behalf of a Section 501(c) organization for other types of federal election activities, such as public communications promoting or supporting federal candidates. 11 C.F.R. §§300.52(d) and 300.65(d). (b) A federal candidate or officeholder can determine a Section 501(c) organization's "principal purpose" by obtaining a signed certification from an authorized representative of the organization stating that (i) the organization's principal purpose is not to conduct election activities; and (ii) the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for federal office (including for federal election activity) in a prior election cycle. 11 C.F.R. §§300.52(e) and 300.65(e). 8. In FEC Advisory Opinion No. 2003-32, the FEC elaborated on the permissible use of state campaign funds not raised in accordance with FECA as contributions to Section 501(c)(3) organizations. A candidate for United States Senate from South Carolina, Inez Tenenbaum, had surplus funds in her	

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	state campaign account. None of the fundraising for her state campaign referred to her potential candidacy for federal office, and no funds had been raised for her state campaign since she declared her federal candidacy. The surplus funds were not raised in accordance with FECA's contribution limits and source prohibitions. The candidate could contribute the surplus funds to Section 501(c)(3) organizations that did not conduct any election activity, but the candidate could not earmark or designate the contributions for any election activity by the Section 501(c)(3) organization, including federal election activity and payment of debts arising from any election activity. The FEC opined that since the contribution would not be made in connection with a federal or nonfederal election, it was not subject to the requirement of 2 U.S.C. §441i(e)(1)(A)-(B) that the funds be subject to FECA's contribution limits and source prohibitions. Furthermore, the candidate could not contribute the surplus funds to Section 501(c)(3) organizations that conducted election activity as their principal purpose, including federal election activity under 11 C.F.R. §300.65(c). Since the funds were not raised in accordance with FECA, they could not be spent in connection with an election for federal office under 2 U.S.C. §441i(e)(1)(A)-(B) and 11 C.F.R. §§300.61 and 300.62. Finally, the permissible solicitation rule described in Paragraph 4 did not apply because the candidate was making a contribution, and not a solicitation. FEC Advisory	

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	Opinion No. 2003-32. 9. (a) In FEC Advisory Opinion No. 2007-8, the FEC addressed whether an individual can donate funds to Section 501(c)(3) charitable organizations to encourage or commemorate performances by professional entertainers at federal election campaign events. Michael King, an individual, wished to focus the public's attention on the importance of certain Section 501(c)(3) organizations that provided assistance to the families of U.S. military personnel who served in Iraq. Mr. King was neither a candidate for public office nor an officeholder. Mr. King planned to donate a portion of his personal funds to one or more of the organizations in honor of certain performances at campaign events of political party committees or candidates for federal office. Mr. King hoped that the performances at the campaign events, together with the publicity surrounding his donations, would provide a platform to raise public awareness of these organizations. Mr. King also planned to establish the Foundation, which would also be a Section 501(c)(3) organization, to collect donations from other persons and distribute them for the purposes discussed above. Mr. King or the Foundation would select the recipient organizations, determine the amount of each donation, and choose which performances to honor with donations, possibly with suggestions from the performers. Each	

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	performer would volunteer in an individual capacity (rather than as an incorporated entity), and would select the campaign events at which he or she would perform, but would not receive any financial, tax, or other tangible benefit from Mr. King, the Foundation, or any of the organizations receiving the donations. In some cases, Mr. King and the Foundation would make donations honoring performers who, independently of Mr. King, committed to perform at a campaign event. In other cases, Mr. King would take a more active role in arranging the performances by using his personal contacts in the entertainment industry to identify performers who might be willing to volunteer their services at specific campaign events and encouraging them to do so. He would take those actions either independently of any political campaign, or in coordination with a federal candidate or political party committee. Mr. King would not be compensated for his services and all costs associated with the performances themselves (such as expenses for the rental of the venue and performer's travel) would be paid for by the campaign or political party committee, not by Mr. King, the Foundation, or the performers. In addition, Mr. King and the Foundation planned to publicize their charitable donations on their own Websites to draw attention to the work of the charitable organizations. They would not make any "public communications" under 11 C.F.R. §100.26.	

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	(b) The FEC opined that since Mr. King volunteered his time and assistance to federal candidates and political party committees by arranging for performers to appear at campaign events, his services came under the volunteer exemption from the definition of contribution under 2 U.S.C. §431(8)(B)(i) and 11 C.F.R. §100.74. The exception for volunteer activities was restricted to donations of the volunteer's own time and services, and did not generally exempt actual costs incurred on behalf of a federal candidate or political party committee. For example, if Mr. King traveled across the country at the request of a federal candidate to arrange for an entertainer to perform at the candidate's campaign event, then Mr. King's unreimbursed payment for that travel would be a contribution to that candidate's committee to the extent that the travel costs exceeded $1,000 per candidate or $2,000 per year. See 2 U.S.C. §431(8)(B)(iv) and 11 C.F.R. §100.79 (unreimbursed payment for transportation and subsistence expenses); see also 2 U.S.C. §431(8)(B)(ii) and 11 C.F.R. §100.75 (use of volunteer's real or personal property), 11 C.F.R. §100.76 (use or church or community room), and 11 C.F.R. §100.77 (invitations, food, and beverages). (c) Similarly, the value of the performers' services were also exempt under 2 U.S.C. §431(8)(B)(i) and 11 C.F.R. §100.74 from the definition of contribution. The performers would provide personal services to a federal candidate or political	

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	party committee in their individual capacities and without compensation, and all costs associated with the performances (such as expenses for the rental of the venue and the performers' travel) would be paid by the federal candidate committee or political party committee, and not by Mr. King, the Foundation, or the performers. (d) Mr. King's proposed charitable donations would not be the payment of compensation to the performers or a contribution by Mr. King to a federal candidate or political committee. Under FECA and FEC regulations, "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose" is a contribution. See 2 U.S.C. §431(8)(A)(ii); 11 C.F.R. §100.54. Mr. King planned to make donations directly the organizations, and not to the performers. Furthermore, the performers would not receive any financial, tax, or other tangible benefit from Mr. King, the Foundation, or the recipient organizations. Accordingly, Mr. King's donations to charities would not be "compensation" to the performers, and in turn, the donations would not render the performers ineligible for the volunteer exemption. (e) The FEC also opined that the donations were not prohibited corporate expenditures. The purpose of the donations was to motivate musicians, performers, and other types of talent to volunteer on behalf of federal campaigns.	

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	The donations did not act as an incentive to any person to vote for or against any Federal candidate. Nor did the donations act as an incentive to any person to make a contribution to or expenditure on behalf of a federal candidate or committee. Under Citizens United, corporations are no longer bound by this aspect of the advisory opinion. The only connection that the donations had to a federal election was that they encouraged volunteer activity on behalf of federal candidates. Volunteer activity on behalf of candidates was exempt from regulation by FECA so long as it was "without compensation." 2 U.S.C. §431(8)(B)(i). Thus, the connection between these donations and a federal election was limited to activities that Congress explicitly left unregulated. The FEC concluded that the charitable donations were not for the purpose of influencing an election, and therefore were not expenditures. Mr. King could choose to make at least some donations to the Section 501(c)(3) organizations regardless of whether the performers appeared at any campaign events, and at least some of the performers would choose to volunteer their services to candidates regardless of whether Mr. King made any donation to any Section 501(c)(3) organization. In addition, each performer would select the campaign events at which he or she would perform, while Mr. King would choose the charitable organizations. The Advisory Opinion request did not indicate that any performer's appearance would depend	

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	on Mr. King making a donation. Under Citizens United, corporations are no longer bound by this aspect of the advisory opinion. (f) The FEC also opined that Mr. King and the Foundation could publicize their activities provided that the Foundation was not incorporated and not making communications that were endorsements or independent expenditures to individuals outside its restricted class. Under Citizens United, this aspect of the advisory opinion is no longer valid. (g) The provisions of FECA and FEC regulations regarding coordinated communications and "disclaimer" requirements would not apply. Those provisions applied only to a "public communication" under 2 U.S.C. §431(22) and 11 C.F.R. §100.26, and none of the communications by Mr. King would be "public communications" under 2 U.S.C. §§431(22) and 11 C.F.R. §100.26. See 11 C.F.R. §109.21 and 110.11. (h) Mr. King's communications to the public through his own Website would not be "public communications," and would not be "contributions" or "expenditures," because they would be exempt as individual Internet activity. 11 C.F.R. §§100.26, 100.94, and 100.155. The communications by the Foundation on its own Website would likewise not be "public communications," and the Foundation would not make an expenditure or contribution	

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	by engaging in the Website activity of listing the work done by the charity, the volunteers, and committees for which they volunteered, and the charitable donations made on their behalf. (i) If the Foundation was an incorporated entity, it would be generally prohibited from making endorsements beyond its restricted class and prohibited from making independent expenditures beyond its restricted class. See 2 U.S.C. §§431(17) and 441b, 11 C.F.R. §§100.16 and 114.2(b); see also 11 C.F.R. §114.4(c)(6) and FEC Advisory Opinion No. 1997-16. Under Citizens United, this aspect of the advisory opinion is no longer valid. 10. (a) In FEC Advisory Opinion No. 2003-5, the FEC addressed the scope of a federal candidate's or office-holder's permissible solicitations. The National Association of Home Builders of the United States ("NAHB"), a Code Section 501(c)(6) trade association, conducted a Voter Mobilization program. This program consisted of partisan communications to NAHB individual members and their families, and communications to the general public made to encourage an understanding of issues of significance to the home building industry. The program focused on the importance of individual participation in the American democratic process through registration, voting, and direct communication with candidates and elected officials. This activity was funded from the general operating accounts of	

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	NAHB, which did not limit their receipts to monies subject to FECA's amount limits and source prohibitions. (b) The FEC opined that a federal candidate or officeholder could attend and speak at an NAHB forum to discuss national policy issues of importance to the industry for which the NAHB invited only representatives of firms or individuals who made contributions to the Voter Mobilization program. When solicitations did not occur at the forum, the federal candidate's or officeholder's attendance and speaking were not a solicitation subject to FECA. In addition, the federal candidate or officeholder could be listed as a "featured guest" in pre-event invitations, as long as the invitations did not solicit nonfederal funds. (c) NAHB also held sporting events for its membership, such as golf events, to raise funds for its Voter Mobilization program. If NAHB's principal purpose was not to conduct election activities, a federal candidate or officeholder could make a general solicitation of funds for NAHB without regard to FECA's source prohibitions and amount limitations, and regardless of whether NAHB periodically conducted election activities. To the extent that the federal candidate or officeholder solicited funds for the Voter Mobilization program, the solicitations could be made only to individuals for no more than $20,000 per individual. (d) Since the solicitation rules for federal candidates or officeholders apply to Section 501(c) organizations, FEC	

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	Advisory Opinion No. 2003-5, which was addressed to a Section 501(c)(6) organization, also applies to Section 501(c)(3) and 501(c)(4) organizations. 11. A candidate who receives a contribution in accordance with FECA, and an individual who receives a contribution as support of the individual's activities as a federal officeholder, can use the funds for contributions to charitable organizations under Code Section 170(c). The charitable organization cannot convert the contributions to the personal use of the candidate or officeholder, and cannot pay the candidate or officeholder compensation before the organization expends the entire contribution. 2 U.S.C. §439a(a)-(b); 11 C.F.R. §§113.1(g) and 113.2. See also FEC Advisory Opinion No. 2011-02 (Senator Scott Brown's campaign committee's use of campaign funds to purchase copies of Senator's autobiography for distribution to financial contributors and political supporters permissible; publisher's contribution of Senator's royalties to a tax-exempt Section 170(c) organization also permissible; Senator cannot receive the royalties prior to contribution to Section 170(c) organization but can designate the organization); FEC Advisory Opinion No. 2006-18 (principal campaign committee of Representative Kay Granger can use its Website, mailing list, and paid personnel to promote sales of Representative Granger's book and to organize, attend, and promote book-related events when Representative Granger will donate all royalties to two	

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	Section 501(c)(3) charitable organizations); FEC Advisory Opinion No. 2005-6 (former Congressman can contribute campaign funds to a Section 501(c)(3) organization that bears his name as long as neither the Congressman nor his family members receive compensation from the organization); FEC Advisory Opinion No. 2005-5 (United States Representative established a state committee to explore candidacy for Governor of Illinois; all funds raised by state committee complied with FECA limitations; state committee may use remaining funds to make donations to Section 501(c)(3) organizations that do not conduct election activity; such donations do not involve transfers, spending, or disbursements of funds in connection with a federal or nonfederal election and therefore do not fall within the restrictions of 2 U.S.C. §441i(e)(l)); FEC Advisory Opinion No. 2003-30 (United States Senator from Illinois announced he would not seek re-election in 2004; Senator's principal campaign committee had been fundraising since the 1998 general election; committee could contribute cash-on-hand to a Code Section 170(c) organization as long as contributions do not convert cash-on-hand to Senator's personal use); FEC Advisory Opinion No. 2003-18 (candidate for United States Senate was defeated in Republican primary; approximately $60,000 in refund checks that were returned to contributors were not cashed; the contributions were designated for the general election and could not be treated as permissible campaign funds eligible for contribution to charitable organizations under 11	

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	C.F.R. §§102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i)). 12. Members of the House of Representatives and employees of the House of Representatives cannot accept honoraria, but can direct a payment in lieu of an honorarium not to exceed $2000 to a charitable organization under Code Section 170(c) from which neither the Member or employee, nor a parent, sibling, spouse, child, or dependent relative of the Member or employee, derives a financial benefit. House Rule XXV §1(c). The Rules of the Senate prohibit all honoraria, including payments in lieu of honoraria to charitable organizations. Senate Rule XXXVI; 5 U.S.C. Appendix 4 §501(b). 13. A federal candidate and officeholder who also serves as a national party committee officer can contribute his or her personal funds to organizations engaging in voter registration activity as defined in 11 C.F.R. §100.24(a)(2). The contributions to each organization cannot be in amounts that are so large, or in amounts that constitute such a substantial percentage of the organization's receipts, that the organization would be considered financed by the officeholder. FEC Advisory Opinion No. 2004-25.	

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	1. Communications by a corporation to the public on business and economic issues important to the corporation, and that are not electioneering communications, do not come within the prohibition on corporate contributions and expenditures. FEC Advisory Opinion No. 1984-57 (publication of article in corporate newsletter on pending legislation to prevent corporate takeovers not subject to FECA); MUR 1318 (newspaper advertisements paid for by corporation that are critical of an issue, but do not mention a candidate, campaign, or upcoming election, are not a contribution under FECA). Under Citizens United, as long as the communications are not coordinated with a candidate or political party, they are permissible and protected by the First Amendment. 2. A corporation, such as an incorporated Section 501(c)(4) organization, can create a separate segregated fund ("SSF"), otherwise known as a political action committee ("PAC"), for participation in federal campaigns. 2 U.S.C. §441b(b). The corporation is known as the PAC's connected organization. The connected organization creates a PAC when: (a) the connected organization's governing body adopts a resolution creating the PAC; (b) the connected organization appoints the persons to direct the PAC's operations; or (c) the connected organization begins to pay the PAC's administrative expenses. 11 C.F.R. §102.1(c). As discussed in Paragraphs 14 to 23 of the I.R.C. column, a Section 501(c)(3) organization can create a separately incorporated and affiliated Section 501(c)(4) organization, which can then	1. (a) Participation or intervention in a campaign includes, without limitation, publication of written or printed statements, and the making of oral statements on behalf of or in opposition to a candidate for public office. Treas. Reg. §1.501(c)(3)-1(c)(3)(iii); PLR 201416011 (IRS revoked the Section 501(c)(3) status of The Patrick Henry Center for Individual Liberty; organization published a series of written statements favoring the candidacy of one candidate, and opposing the candidacies of other candidates); IRS News Release 2004-59, "Charities May Not Engage in Political Campaign Activities," April 28, 2004 ("These organizations cannot endorse any candidates, make donations to their campaigns, engage in fund raising, distribute statements, or become involved in any other activities that may be beneficial or detrimental to any candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of section 501(c)(3).") (available at http://www.irs.gov/newsroom/article/0,,id=122887,00.html). (b) A Section 501(c)(3) organization cannot establish a Section 527 political organization, e.g., a PAC, to engage in campaign activity. Treas. Reg. §1.527-6(g); Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000). (c) A Section 501(c)(3) organization becomes an "action" organization and loses its tax-exempt status as a Section 501(c)(3) organization if: (i) a substantial part of its activities

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	create a PAC. 3. A Section 501(c)(4) organization that forms a PAC must be a membership organization. A membership organization is a corporation without capital stock that: (a) is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution, or other formal organizational documents; (b) expressly states the qualifications and requirements for membership in its articles, bylaws, constitution, or other formal organizational documents; (c) makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request; (d) expressly solicits people to become members; (e) expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and (f) is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to federal office. 11 C.F.R. §114.1(e)(1). 4. A member of a Section 501(c)(4) organization must affirmatively accept the organization's invitation to become a	is attempting to influence legislation; (ii) it participates or intervenes in any political campaign on behalf of or in opposition to any candidate for public office; or (iii) its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation, and it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research, and making the results thereof available to the public. Treas. Reg. §1.501(c)(3)-1(c)(3)(i)-(iv). (d) Although an "action" organization cannot qualify for tax-exemption under Code Section 501(c)(3), it can qualify for tax-exemption as a social welfare organization under Code Section 501(c)(4) if it meets the requirements of Treas. Reg. §1.501(c)(4)-1(a). Treas. Reg. §1.501(c)(3)-1(c)(3)(v). <u>CANDIDATE FOR PUBLIC OFFICE</u> 2. Under Treas. Reg. §1.501(c)(3)-1(c)(3)(iii), a "candidate for public office" is "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local." <u>See also</u> T.A.M. 200437040 (Sept. 10, 2004) ("One need not be a party nominee or run an organized political campaign to be a candidate for public office."). Unlike FECA, the Section 501(c)(3) prohibition is not limited to federal candidates and officeholders, and applies to state and local candidates.

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	member, and satisfy one of (a), (b), or (c): (a) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake. (b) Pay membership dues at least annually of a specific amount predetermined by the organization. (c) Have a significant organizational attachment to the membership organization, which includes: affirmation of membership on at least an annual basis, and direct participatory rights in the governance of the organization. 11 C.F.R. §114.1(e)(2). (d) Participation in the organization's governance is usually satisfied by the right to elect board members. The members must have the right to vote for at least one member of the highest governing body. Other participatory rights may qualify, such as the right to vote on policy questions or approve the annual budget. 11 C.F.R. §114.1(e)(2)(iii). (e) A person does not become a member by becoming a Facebook friend of the organization, or signing up for its e-mail list. 5. A Section 501(c)(4) organization can solicit contributions for its PAC from its members, and must inform members at the time of solicitation of the PAC's political purpose, and that the members can refuse to contribute without reprisal. 11	3. "Public office" includes a state precinct committeeman position that was created by statute, has a fixed term, appears on an election ballot, is not occasional or contractual, and requires an oath of office. G.C.M. 39,811 (June 30, 1989). The article by Judith E. Kindell and John Francis Reilly entitled, "Election Year Issues" in the IRS FY 2002 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook (the "2002 CPE Text"), states that these factors "should be taken into consideration in determining whether elections for political party positions are elections for public office." 2002 CPE Text, at 340. See also Treas. Reg. §1.527-2(d) ("The facts and circumstances of each case will determine whether a particular federal, State or local office is a 'public office.' Principles consistent with those found under §53.4946-1(g)(2) (relating to the definition of public office) will be applied."); Treas. Reg. §53.4946-1(g)(2) (public office turns on whether a significant part of the activities is the independent performance of policy making functions; whether the office is created by Congress, a State constitution, the State legislature, a municipality, or other governmental body pursuant to authority conferred by the Congress, State constitution, or State legislature; and whether the powers conferred by the office and the duties to be discharged by the office are defined by the Congress, State constitution, State legislature, or through legislative authority). 4. (a) A candidate for public office does not include ballot measures, bond measures, constitutional amendments,

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	C.F.R. §§114.5(a)(3)-(4) and (g), and 114.7(a). The Section 501(c)(4) organization can suggest the amount members may wish to contribute, and must also state that a member may contribute more or less. The organization cannot specify a minimum contribution. 11 C.F.R. §114.5(a)(2). 6. The Section 501(c)(4) organization almost always wishes to solicit funds for its PAC from the members of the Section 501(c)(3) organization. To make this solicitation, the Section 501(c)(4) organization and Section 501(c)(3) organization cannot be affiliated. 11 C.F.R. §§114.2(b)(1) and 114.7(c). A membership organization and its state or local chapters are deemed affiliated. Affiliation is also determined by weighing the following factors: (a) One organization has the ability to direct or participate in the other's governance through provisions of the governing documents or through formal or informal practices or procedures. (b) The organizations have common or overlapping membership, which indicates a formal or ongoing relationship between them. (c) The organizations have common or overlapping officers or employees, which indicates a formal or ongoing relationship. (d) One organization arranges for funds in a significant amount or on an ongoing basis to be provided to the other	initiatives, and referenda. Treas. Reg. §1.501(c)(3)-1(c)(3)(ii)-(iii). These activities are considered legislation and are subject to the Section 501(c)(3) insubstantiality limitation on lobbying. See Paragraphs 40 to 53 for a discussion of the insubstantiality limitation on lobbying. (b) A candidate for public office does not include a nominee for appointive office, such as a Supreme Court Justice, federal appellate or district court judge, or Cabinet Secretary. When the nominee's appointment requires the approval of a legislative body, the Section 501(c)(3) organization's activities in support of or opposition to the appointment are lobbying activities, and are subject to the Section 501(c)(3) insubstantiality limitation on lobbying. IRS Notice on Attempts to Influence Judicial Appointments by Exempt Organizations (July 21, 2005) ("Attempts to influence Senate confirmation of a federal judicial appointment are not considered campaign intervention, which is specifically forbidden by section 501(c)(3). However, because attempts to influence Senate confirmation are considered lobbying, they are subject to the rules on lobbying: • Section 501(c)(3) organizations may engage in lobbying in furtherance of their exempt purposes. • The lobbying may not be a substantial part of the organization's activities.") (available at http://www.irs.gov/charities/article/0,,id=1413272,00.html); IRS Notice 88-76, 1988-2 C.B. 392; G.C.M. 39,694 (Jan. 21, 1988). See Paragraphs 40 to 53 for a discussion of the insubstantiality limitation on lobbying.

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	organization. (e) One organization or its agent had an active or significant role in the formation of the other. 11 C.F.R. §100.5(g)(4)(ii). 7. Neither a Section 501(c)(4) organization nor its PAC can solicit the general public for contributions, but the PAC can accept unsolicited contributions. 11 C.F.R. §114.5(i)-(j). 8. A Section 501(c)(4) organization and its PAC can use internal newsletters to solicit contributions as long as distribution is limited to the organization's members, executive or administrative personnel, and their families, and the newsletters do not become a public solicitation. 11 C.F.R. §114.7(a) and (e)-(h). Any solicitation on the Section 501(c)(4) organization's Website should be limited to a members only area. Cf. FEC Advisory Opinion No. 2000-10 (trade association created members only, password protected portion of Website for its PAC that contained a solicitation authorization form for members to download and print; arrangement was not a PAC solicitation subject to the disclaimer required by 2 U.S.C. §441d). 9. A Section 501(c)(4) organization can make unlimited express advocacy communications to its members, and can coordinate these communications with candidates. 2 U.S.C. §§431(8)(B)(vi) and (9)(B)(iii) and 441b(b)(2)(A); 11 C.F.R. §§100.134(a) and (e), 114.1(j), and 114.3(a). Similarly, a corporation can make unlimited express advocacy communications to its stockholders and executive or	(c) A Section 501(c)(3) organization's activities in support of or in opposition to a nominee for appointive office are an exempt function under I.R.C. §527(e)(2), and the organization's expenditures on these activities are subject to tax under I.R.C. §527(f). For a Section 501(c)(3) organization to avoid the tax, it must form a PAC to make the expenditures. I.R.C. §527(f)(3); John Francis Reilly and Barbara A. Braig Allen, "Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations," IRS FY 2003 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, at L-13 to L-14 (the "2003 CPE Text"). See Paragraphs 27 and 28 for a discussion of the Section 527(f) tax. 5. A candidate likely includes an incumbent until he or she publicly announces his or her decision not to seek re-election. 6. Does the phrase "proposed by others" in Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) include a person who has not yet declared his or her candidacy, but whose potential candidacy is the subject of public debate or speculation? Are the formation of an exploratory or testing-the-waters committee, and a person's public acknowledgment thereof, sufficient? Does a person's control over the exploratory or testing-the-waters committee preclude a finding of being "proposed by others," or does the publicity resulting from the committee's formation trump this control? Cf. Treas. Reg. §1.527-2(c)(1) (an organization's activities in furtherance of a person's election to office are for an exempt function; "The individual

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	administrative personnel and their families, and can coordinate these communications with candidates. Id. 10. A Section 501(c)(4) organization, the Ob-Gyns for Women's Health, and its PAC, can solicit contributions from members of an affiliated Section 501(c)(3) organization, the American College of Obstetricians and Gynecologists. FEC Advisory Opinion No. 2005-3. For this arrangement to pass muster under Code Section 501(c)(3), the Section 501(c)(4) organization must solicit the members in their individual capacities, and without the assistance of the Section 501(c)(3) organization. 11. (a) A Section 501(c)(4) organization can match a member's or employee's contribution to the PAC with a contribution of an equal or lesser amount to a charitable organization as long as the member or employee does not receive a financial, tax, or other tangible benefit from either the Section 501(c)(4) organization or the charitable organization. FEC Advisory Opinion No. 1989-7; FEC Advisory Opinion No. 1986-44. (b) The matching is not a means of exchanging the funds of the Section 501(c)(4) organization for voluntary contributions to the PAC, which is prohibited under 11 C.F.R. §114.5(b). Rather, it is a permissible solicitation expense under 2 U.S.C. §441b(b)(2)(C). (c) The Section 501(c)(4) organization can allow its members or employees to choose from a list of four charities, or can designate a single charity if the member or employee does	does not have to be an announced candidate for the office. Furthermore, the fact that an individual never becomes a candidate is not crucial in determining whether an organization is engaging in an exempt function."). 7. In T.A.M. 9130008 (April 16, 1991), the IRS found that a person who had not yet announced his candidacy was a candidate when his campaign committee published material regarding his record, and referred to his "prospective candidacy." POLITICAL ACTIVITY SEPARATE FROM OR AS PART OF A SECTION 501(c)(3) ORGANIZATION'S EXEMPT PURPOSE 8. In the following situations the IRS has taken the position that when political activity is sufficiently separate from the Section 501(c)(3) organization's tax-exempt functions, or is otherwise a permissible part of a Section 501(c)(3) organization's tax-exempt functions, the activity is not prohibited campaign intervention: (a) (i) In PLR 201127013, a Section 501(c)(3) comprehensive, regional, integrated health care system will participate in a separate nonprofit membership corporation without capital stock, the primary purpose of which is to conduct the federal and state lobbying of the system's government affairs department. The corporation will be a Section 501(c)(4) social welfare organization, and will have two classes of membership: voting and nonvoting. The system will be the sole voting member with the power to

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	not choose from the list. FEC Advisory Opinion No. 1994-6. See also FEC Advisory Opinion No. 2003-39 (member of Code Section 501(c)(6) trade association, which acted as a collecting agent for the association's PAC, matched contributions to the PAC from the member's restricted class by contributing to any Section 501(c)(3) organization of the contributor's choice, dollar for dollar; matching contributions were a permissible payment by collecting agent of costs incurred in soliciting and transmitting contributions to the PAC under 11 C.F.R. §102.6(c)(2)(i)). See Paragraph 23 of the I.R.C. column for the IRS position on the effect of a matching program on the tax-exempt status of an affiliated Section 501(c)(3) organization, and the tax treatment of the matching program. 12. (a) A corporation, Anheuser-Busch Companies, Inc., established a matching charitable contribution program in which the employee designates the charity to receive the contribution. In addition, if the employee designates the United Way, the employee also receives credit for gifts from the corporation. If an employee donates $100 or more to the United Way, the employee receives a free case of beer. If an employee donates a certain percentage of his or her salary to the United Way, the employee receives a beer stein, plaque, or wall print. (b) This arrangement was permissible under a three-prong analysis. First, the matching contribution was permissible as long as no contributor to the corporation's PAC received a	elect the board of directors and approve the budget. The system's tax-exempt subsidiaries will be the nonvoting members. All members will pay nominal membership dues to the corporation. (ii) The corporation will have eleven members of its board of directors, including its president, secretary, and treasurer. A majority of the corporation's board will consist of members of the system's or tax-exempt subsidiaries' board of directors, officers, or employees. The system's treasurer or assistant treasurer will serve as the corporation's treasurer. (iii) The system will allocate the cost of any shared or leased employees, goods, services, or facilities between the corporation and the system and its tax-exempt subsidiaries. The fair value of shared or leased employees, goods, or facilities will be reimbursed to the entity incurring the direct cost. (iv) The corporation will form a federal political action committee and a state political action committee under Code Section 527. Prior to conducting any activities, the federal PAC's and state PAC's initial boards and officers will be appointed by the corporation's chairperson. A majority of both the federal PAC's and state PAC's board of directors will consist of members of the corporation's board of directors. The corporation's treasurer will serve as treasurer of the federal PAC and the state PAC. (v) The federal PAC's board will have exclusive general

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	financial, tax, or other tangible benefit or premium from the corporation, PAC, or the charity. Second, the prizes were permissible "so long as they are not disproportionately valuable in relation to the contributions generated." FEC Advisory Opinion No. 2003-33. The FEC regulations provide that a "reasonable practice to follow is for the separate segregated fund to reimburse the corporation or labor organization for costs which exceed one-third of the money contributed." 11 C.F.R. §114.5(b)(2). Third, "if receipt of a token gift or prize of less than one-third the value of the contribution, standing alone, does not amount to the exchange of corporate treasury money for voluntary contributions, the Commission does not believe that such a token gift or prize, when combined with the receipt of a charitable matching donation, would amount to the exchange of corporate treasury money for voluntary contributions." FEC Advisory Opinion No. 2003-33. See generally Renee Dudley, "Wal-Mart to HP Reap Worker Political Donations Through Charities," Bloomberg.com (Dec. 23, 2013) ("U.S. companies, forbidden to give money directly to political action committees, are taking advantage of controversial federal rules allowing them to ask employees to do it for them in exchange for matching charitable donations. It's legal and gives businesses from Wal-Mart Stores Inc. to Coca-Cola Co. to Hewlett-Packard Co. a way to fund their PACs, which direct money to political candidates. The matching contributions provide an incentive for employees, most of them managers, to contribute to the PAC. . . . In an interview, former FEC chairman Scott Thomas said the	supervision and control over the affairs and funds of the federal PAC. The federal PAC's board will determine the policies and procedures for collection and payment of funds to the candidates and political committees that the federal PAC will support, and the amount of all budgeted allocations for expenditures by the federal PAC. (vi) The state PAC's board will have exclusive general supervision and control over the affairs and funds of the state PAC. The state PAC's board will determine the policies and procedures for collection and payment of funds to the candidates and political committees that the state PAC will support, and the amount of all budgeted allocations for expenditures by the state PAC. (vii) No assets or funds of the system or its tax-exempt subsidiaries will be used for the establishment, administration, or solicitations of contributions to the PACs. Neither the system nor its tax-exempt subsidiaries will make contributions to the PACs. The corporation and the PACs will maintain separate bank accounts, books, records, and prepare separate financial statements, reports, and tax returns. Any leasing or sharing of employees, goods, services, or facilities between the system or its tax-exempt subsidiaries with the corporation or the PACs will be conducted at arm's length and there will be a reasonable allocation of costs. The corporation and the PACs will each have separate letterhead, address, telephone number, and Internet address.

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	exchange flouts the spirit of campaign-finance laws, which forbid companies from reimbursing for donations, including through a bonus or 'other form of direct or indirect compensation.' 'It was too close to the line,' said Thomas, explaining his rationale for opposing the practice during his 20 years at the FEC. 'It struck me as offering a chunk of money' to PAC donors. Judith Ingram, an FEC spokeswoman, declined to comment.") (available at www.bloomberg.com/news/print/2013-12-23/wal-mart-to-hp-reap-worker-political-donations-through-charities.html). 13. The maximum contribution that an individual can make to a PAC is $5,000 per calendar year. This amount is not indexed for cost-of-living adjustments. 2 U.S.C. §441a(a)(1)(C). The $5,000 annual limit is subject to constitutional attack on two grounds. First, the $5,000 annual limit has been in effect since 1940. According to the Bureau of Labor Statistics, $5,000 in 1940 had the purchasing power of $77,000 in 2010. Thus, the $5,000 is not calibrated to any current threat of corruption. In EMILY's List v. FEC, 581 F.3d 1, 21 (D.C. Cir. 2009), one of the reasons why the court found that the FEC's rules for allocation of funds by nonconnected political committees to finance activities that influence both federal and nonfederal elections were unduly burdensome was the low $5,000 limit. Second, the $5,000 limit is not indexed for inflation. In Randall v. Sorrell, 548 U.S. 230, 238-40 (2006), one of the reasons why the Court struck down Vermont's contribution limits was the failure to index the limits for inflation. In addition, the limit on contributions to PACs was	(viii) Solicitations for contributions to the PACs will be made by the PACs. There will be no joint fundraising, postal, or electronic mailings or events conducted between the system and its tax-exempt subsidiaries and the PACs. The PACs will not solicit any contributions or transact any other business using the system's or tax-exempt subsidiaries' names, and will not use mailings signed by the system's or tax-exempt subsidiaries' employee, officer, director, or trustee in an official capacity. Neither the system nor its tax-exempt subsidiaries will distribute any material produced or prepared by the PACs. Neither the system nor its tax-exempt subsidiaries will provide mailing lists to the PACs without making them available to other Section 527 organizations on an equal basis. (ix) The system and its tax-exempt subsidiaries will offer a payroll deduction plan to their employees, pursuant to which they can elect to have a voluntary contributions to any Section 527 organization deducted automatically and forwarded to that organization. (x) No political organization will solicit payroll deductions using the system's or tax-exempt subsidiaries' facilities or postal or electronic mailings. The system and its tax-exempt subsidiaries will not distribute any publication, mass media advertisement, or programs encouraging payroll deduction to any political organization. All employees will be required to voluntarily consent in writing to the payroll deduction. All transfers of employee payroll deductions to political

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	originally meant to be greater than the limit on contributions to candidates. In the absence of indexing for inflation for contributions to PACs, the limit on contributions to candidates, which are indexed for inflation, will become greater than the limit on contributions to PACs. See Allison R. Hayward, "What Changes Do Recent Supreme Court Decisions Require for Federal Campaign Finance Statutes and Regulations?," 44 Indiana Law Review 285, 288-89 (2010).	organizations will be made promptly upon receipt by the system and its tax-exempt subsidiaries. (xi) The IRS ruled that the establishment and operation of the PACs do not constitute participation or intervention in a political campaign by a Section 501(c)(3) organization. A Section 501(c)(3) organization may establish and control a Section 501(c)(4) organization to conduct certain activities allowable under Code Section 501(c)(4), but not allowable under Code Section 501(c)(3). The organizations must be separately incorporated and keep adequate records to show that tax-deductible contributions are not used to pay for nonexempt purposes under Code Section 501(c)(3), including lobbying. In addition, the Section 501(c)(3) organization and the Section 501(c)(4) organization must operate independently of each other, and each organization must separately administer its own affairs. Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) (dual structure of Section 501(c)(4) organization for lobbying and Section 501(c)(3) organization for other activities permissible; two organizations must be separately incorporated and keep adequate records to show that tax-deductible contributions are not used to pay for lobbying); Moline Properties v. Commissioner, 319 U.S. 436 (1943) (each corporation is a separate taxable entity for federal income tax purposes if the corporation is formed for valid business purposes, and is not a sham, an agency, or instrumentality). In addition, the establishment and operation of the PAC must not be the Section 501(c)(4) organization's

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		primary activity. PLR 201127013. (xii) The IRS also ruled that the system's establishment and operation of a voluntary payroll deduction plan for employees will not constitute intervention in a political campaign. PLR 201127013. The voluntary payroll deduction is not attributable to the system, but to the employees in their personal capacities. But cf. T.A.M. 200446033 (Nov. 12, 2004) (Section 501(c)(3) parent corporation of corporations providing health care services; parent belonged to a trade association that maintained a PAC to support candidates of all political parties for state legislative positions and offices; parent made available PAC's payroll deduction plan for its employees to contribute, and conducted meetings to discuss the PAC and payroll deductions; parent's CEO appeared in a video explaining the impact of political input on the hospital industry, and video was shown at meetings; recipient PAC was not of the employees' choosing, but was selected by and endorsed by employer; parent violated prohibition on campaign intervention). (b) A Section 501(c)(3) health plan's administration of a payroll deduction plan of collecting political contributions from the health plan's employees, and remitting the contributions to the employees' unions for transfer to union sponsored PACs, does not violate the prohibition against campaign intervention. PLR 200151060. "This is not a case of a 501(c)(3) organization establishing a PAC, which is

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		prohibited under section 501(c)(3) of the Code. Health Plan did not select the beneficiary PACs and has no control or influence over them. The PACs are sponsored by the Unions, and on labor issues would likely have political interests differing from those of Health Plan. Thus, there is no identity of interests between Health Plan and the PACs. Nor did Health Plan seek to establish the payroll deduction plan. Instead, the facts show that the plan is a benefit sought by the Unions. Health Plan is legally required to bargain in good faith regarding the establishment of such plan. While Health Plan understandably approached the matter with caution for fear of noncompliance with the federal tax laws, we find that it has developed a reasonable approach to accommodating the interests of its employees that complies with the requirements of section 501(c)(3) of the Code. We note that Health Plan has a legitimate interest in providing benefits to its employees in order to attract and retain a qualified workforce." Id. See also Knox v. Service Employees International Union, 132 S. Ct. 2277 (2012) (for public employees' union to make a special assessment for use in electoral campaign, it must give a new notice to nonmembers to decide whether they wished to contribute to this effort; when public employees' union imposes a special assessment or dues increase, it must give a new notice to nonmembers who previously opted out to decide whether they wished to contribute to union's electoral campaign); Ysursa v. Pocatello Education Association, 129 S. Ct. 1093, 1096 (2009) (Idaho law permitted a public employee to elect to have the employer

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		deduct from wages and remit to the union payments for union dues, and prohibited payroll deductions for political activities; public employee unions challenged under the First Amendment the prohibition as applied to county, municipal, school district, and other local public employers; "The First Amendment prohibits government from 'abridging the freedom of speech,' it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities. Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity. That interest extends to government at the local as well as state level, and nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities."); Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007) (under First Amendment State of Washington can prohibit labor unions for public employees from using the agency-shop fees of a nonmember for election-related purposes unless the nonmember affirmatively consents); Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 320 (6th Cir. 1998) (state statute prohibited public employers from administering automatic payroll deductions for political purposes; court upheld statute's validity against First Amendment attack; "We do not doubt that wage checkoffs are a great tool for maximizing political contributions from

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		public servants. But, in the absence of the public employers administering checkoffs for political causes, all political candidates and funds, regardless of their persuasion, are left with at least the same range of options in deciding how to tap this sector of the population for contributions as they would have had if the state had chosen not to allow any employers to administer wage checkoffs. And more to the point, public employees are left with the same range of options in deciding how to best pool their resources in furtherance of a common cause."). (c) A university can provide facilities and faculty advisors to a student newspaper that publishes editorials on issues concerning candidates as long as the newspaper is operated in a customary journalistic manner, the students determine editorial policy without university intervention, and the newspaper publishes a disclaimer that the editorial views are those of the students and not the university. Rev. Rul. 72-513, 1972-2 C.B. 246. (d) As part of a political science course, a university can require a student to provide services to the campaign of a candidate of the student's choice. The university does not control the student's campaign work, and is reimbursed or paid for any services or facilities provided to the student for use in the campaign. Rev. Rul. 72-512, 1972-2 C.B. 246. As a matter of prudence, a Section 501(c)(3) educational institution should offer courses with this requirement only as an elective.

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		(e) Can a professor at a private university operate a blog that supports and attacks candidates? Must the professor post a disclaimer that the blog contains only his or her views, and not the university's? (f) University X is a section 501(c)(3) organization. X publishes an alumni newsletter on a regular basis. Individual alumni are invited to send in updates about themselves which are printed in each edition of the newsletter. After receiving an update letter from Alumnus Q, X prints the following: "Alumnus Q, class of 'XX is running for mayor of Metropolis." The newsletter does not contain any reference to this election or to Alumnus Q's candidacy other than this statement of fact. University X has not intervened in a political campaign. IRS Fact Sheet 2006-17, Example 12 (Feb. 2006). The IRS also used this example in Rev. Rul. 2007-41, Situation 12, 2007-25 I.R.B. 1421, 1424 (June 18, 2007). (g) A Section 501(c)(3) mail-bundling organization formed to provide employment opportunities to the developmentally disabled can provide mailing services to political campaigns. PLR 9152039. <u>CAMPAIGN INTERVENTION AND ISSUE ADVOCACY</u> 9. A Section 501(c)(3) organization can inform candidates of its positions on issues, and can urge candidates to publicly support its positions. Rev. Rul. 76-456, 1976-2 C.B. 151.

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		(a) The 2002 CPE Text takes the following position on the difference between permissible issue advocacy and prohibited campaign intervention: "Basically, a finding of campaign intervention in an issue advertisement requires more than just a positive or negative correspondence between an organization's position and a candidate's position. What is required is that there must be some reasonably overt indication in the communication to the reader, viewer, or listener that the organization supports or opposes a particular candidate (or slate of candidates) in an election, rather than being a message restricted to an issue." 2002 CPE Text, at 345. See also Branch Ministries v. Rossotti, 40 F. Supp. 2d 15 (D.D.C. 1999), aff'd, 211 F.3d 137 (D.C. Cir. 2000) (on October 30, 1992, four days before the Presidential election, church placed a full-page advertisement in USA Today and Washington Times with the headline, "Christians Beware. Do not put the economy ahead of the Ten Commandments;" advertisements claimed that then Governor William Jefferson Clinton of Arkansas supported abortion on demand, homosexuality, and the distribution of condoms in public schools, cited Biblical passages, and stated that "Bill Clinton is promoting policies that are in rebellion to God's laws," and concluded with the question, "How then can we vote for Bill Clinton?;" court upheld IRS revocation of church's tax-exempt status). (b)(i) In T.A.M. 9130008 (July 26, 1991), the IRS addressed whether issue advertisements were an exempt function under Code Section 527(e)(2). A Section 527 organization, X, was

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		formed to promote the potential candidacy of Z for governor. Supporters of Z formed a separate organization, Y, to increase fiscal responsibility in government, and Z served as its honorary chairman. (ii) X used Y to mail materials to promote a statewide referendum concerning fiscal responsibility in government, and to promote Z's name to the general public. The referendum was on the election ballot for the particular year in question, but was nonbinding as were all referendums in the state. The referendum would likely have an influencing effect on the state's legislators in any legislative action. Y sent thousands of pieces of direct mail promoting fiscal responsibility and Z as a leader on this issue. The payment of V dollars by X to Y funded this direct mail campaign. (iii) One of the mailings consisted of a two page letter from Z as honorary chairman of Y enclosing a newspaper clipping of Z's accomplishments in the area of fiscal responsibility. A second mailing was also sent concerning the issue of fiscal responsibility and Z was prominently displayed as being a supporter of this effort. Z's name and picture were prominently displayed throughout these mailings. (iv) At the time these mailings were sent, Z was not an announced candidate for governor, nor did these mailings mention the election or his possible candidacy. X stated to the IRS that the mailings were intended to increase Z's statewide name recognition by the general public and his

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		reputation as a leader on state issues. X also stated to the IRS that the mailings were not only designed to support the referendum, but to promote the possible candidacy of Z for governor. (v) The IRS found that these activities were an exempt function under I.R.C. §527(e)(2): "The fact that an activity may constitute grassroots lobbying (or direct lobbying) for other purposes under the Internal Revenue Code does not preclude a finding that it may constitute political campaign activity and, thus, exempt function activity for purposes of section 527 of the Code. Whether the activity directly relates to the influencing of the political selection process depends on the facts and circumstances of the particular case." See discussion of definition of exempt function in Paragraphs 27 to 38 below. 11. In IRS Fact Sheet 2006-17 (Feb. 2006), the IRS provides the following example of the distinction between issue advocacy and campaign intervention: <u>Example 16</u>: Candidate A and Candidate B are candidates for the state senate in District W of State X. The issue of State X funding for a new mass transit project in District W is a prominent issue in the campaign. Both candidates have spoken out on the issue. Candidate A supports the new mass transit project. Candidate B opposes the project and supports State X funding for highway improvements instead. P is the executive director of C, a section 501(c)(3) organization that

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		promotes community development in District W. At C's annual fundraising dinner in District W, which takes place in the month before the election in State X, P gives a lengthy speech about community development issues including the transportation issues. P does not mention the name of any candidate or any political party. However, at the conclusion of the speech, P makes the following statement, "For those of you who care about quality of life in District W and the growing traffic congestion, there is a very important choice coming up next month. We need new mass transit. More highway funding will not make a difference. You have the power to relieve the congestion and improve your quality of life in District W. Use that power when you go to the polls and cast your vote in the election for you state senator." C has violated the political campaign intervention prohibition as a result of P's remarks at C's official function shortly before the election, in which P referred to the upcoming election after stating a position on an issue that is a prominent issue in a campaign that distinguishes the candidates. The IRS also used this example in Rev. Rul. 2007-41, Situation 16, 2007-25 I.R.B. 1421, 1425 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 9 (Nov. 2013). See other examples from IRS Fact Sheet 2006-17 and Rev. Rul. 2007-41 in Paragraphs 32 to 38 below. 12. The IRS has rejected the express advocacy standard of Buckley v. Valeo, 424 U.S. 1, 77 (1978) (discussed in Paragraphs 7 to 11 of the FECA column for "Statutory

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		Provisions on Contributions, Expenditures, and Electioneering"), to determine prohibited campaign intervention under Section 501(c)(3). 2002 CPE Text, at 346-49. See also PLR 200602042 (the "determination for purposes of section 501(c)(3) does not hinge on whether the communication constitutes 'express advocacy' for Federal election law purposes. Rather for purposes of Section 501(c)(3), one looks to the effect of the communication as a whole; including whether support for, or opposition to, a candidate for public office is express or implied."); T.A.M. 200044038 (Nov. 3, 2000) (campaign intervention does not hinge on whether the communication constitutes express advocacy for federal election law purposes; "[T]he letter does not directly urge the election or defeat of either candidate. Nevertheless, by featuring A [the candidate's] signature and using the first person with a text in the letter sounding very much like campaign rhetoric, the fundraising letter is inextricably tied to the election of the signatory of the letter."); T.A.M. 9609007 (March 1, 1996) (Buckley's express advocacy rule does not apply to Section 501(c)(3) campaign intervention prohibition); 1999 IRS Nondocketed Service Advice Review 499 ("[T]he plain language of the statute (section 527) describes as exempt functions any activity involving the influencing or attempt to influence the election of a candidate for public office. Furthermore, the legislative history to section 527 makes no mention whatsoever of any intent to limit the scope of exempt functions by the provisions of FECA. Moreover, the purpose of FECA is totally different from the purpose of section

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		527(f). The purpose of the FECA limitations on for-profit and not-for-profit corporate activity is to prevent large accumulations of wealth from affecting federal elections. The purpose of section 527(f) is to subject tax-exempt entities to tax on income used for activities that do not further a social goal.").
		13. (a) The holdings of the United States Supreme Court in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), and FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) ("WRTL") (Citizens United is discussed in Paragraphs 10 and 11, and WRTL is discussed in Paragraph 9, of the FECA column for "Statutory Provisions on Contributions, Expenditures, and Electioneering"), raise the issue of whether the First Amendment limitation on the government's ability to restrict independent expenditures and issue advocacy also applies to the government's ability to use an organization's tax-exempt status to restrict a Section 501(c)(3) organization's independent expenditures and lobbying and issue advocacy. Section 501(c)(3) organizations can argue that the reasoning underlying the holding of Citizens United that corporations have a First Amendment right to make independent expenditures also applies to Section 501(c)(3) organizations. They can also argue that under Citizens United and WRTL, a contextual facts and circumstances test to determine permissible and impermissible express advocacy and issue advocacy is inappropriate. Accordingly, the facts and circumstances test under the federal tax laws also is impermissible.

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		Furthermore, the ability of a Section 501(c)(3) organization to make independent expenditures and engage in lobbying and issue advocacy through an affiliated Section 501(c)(4) organization and its PAC is unduly burdensome. (b) Whether these arguments will succeed turns on whether an organization's tax-exempt status and the deductibility of contributions to it are financial subsidies that Congress can grant or deny as a matter of legislative grace, and whether the restrictions of the federal tax laws are unconstitutional conditions on independent expenditures and lobbying and issue advocacy. In determining whether a condition is permissible, an important factor is whether the a Section 501(c)(3) organization's ability to make independent expenditures and engage in lobbying and issue advocacy through an affiliated Section 501(c)(4) organization is unduly burdensome for First Amendment purposes. (c) The Supreme Court has upheld the insubstantiality limitation on legislative lobbying as a permissible condition on the organization's tax-exemption, and on the charitable deduction for contributions to the organization. In Regan v. Taxation With Representation, 461 U.S. 540, 548-51 (1983), the Court held that "tax exemptions and tax deductibility are a form of [federal] subsidy," and "Congress is not required by the First Amendment to subsidize lobbying." See also Agency for International Development v. Alliance for Open Society International, 133 S. Ct. 2321, 2328-29 (2013) (denial of a tax deduction for lobbying expenses is a

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		permissible Congressional decision not to subsidize lobbying, and does not impose an unconstitutional burden on protected First Amendment activity); Cammarano v. United States, 358 U.S. 498, 513 (1959) (Treasury regulation that denied a deduction for ordinary and necessary business expenses for the cost of ads relating to a ballot measure did not violate the First Amendment; "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in such activities is required to do;" "[I]t appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."); Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) (court upheld insubstantiality limitation on lobbying against First Amendment attack), cert. denied, 414 U.S. 864 (1973). (d) In an important concurring opinion in Regan, Justice Blackmun, joined by Justices Brennan and Marshall, wrote that although the First Amendment does not require the government to subsidize lobbying through a tax deduction, conditioning the deduction on a complete prohibition on lobbying would be unconstitutional since it would deny "a significant benefit to organizations choosing to exercise their constitutional rights." 461 U.S. at 552. This concern was

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		addressed by the ability of a Section 501(c)(3) organization to use an affiliated, yet separate, Section 501(c)(4) organization to engage in lobbying. If the Section 501(c)(3) organization's ability to use a Section 501(c)(4) organization for lobbying is limited, the limitation creates constitutional issues: "Should the IRS attempt to limit the control these organizations exercise over the lobbying of their §501(c)(4) affiliates, the First Amendment problems would be insurmountable." 461 U.S. at 553. Justice Blackmun also wrote, "[A]n attempt to prevent §501(c)(4) organizations from lobbying explicitly on behalf of their §501(c)(3) affiliates would perpetuate §501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. In my view, any such restrictions would render the statutory scheme unconstitutional." 461 U.S. at 553-54. (e) Under Citizens United, Section 501(c)(3) organizations can argue that the subsidy no longer makes a difference in the constitutional analysis. In the majority opinion in Citizens United, Justice Kennedy acknowledged that "[s]tate law grants corporations special advantages -- such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." Nevertheless, this state support is an insufficient justification to prohibit speech, and the state "cannot exact as the price of those special advantages the forfeiture of First Amendment rights." 130 S. Ct. at 905.

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		(f) Justice Kennedy also rejected the argument that the prohibition on independent expenditures did not violate a corporation's First Amendment rights because the corporation could form a PAC to make them. He wrote that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." Furthermore, "[e]ven if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems. . . . PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." 130 S. Ct. at 897. (g) The government can argue that the special advantages granted to Section 501(c)(3) organizations under state law are not government subsidies. Once it is recognized that Congress does not have any obligation to subsidize a Section 501(c)(3) organization's independent expenditures and lobbying and issue advocacy, under Regan it is not unduly burdensome to require a Section 501(c)(3) organization to carry out its political activities through an affiliated, yet separate, Section 501(c)(4) organization. See generally Miriam Galston, "When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?," 13 University of Pennsylvania Journal of Constitutional Law 867 (May 2011); Frances R. Hill, "Exempt Organizations in the 2008 Election: Will Wisconsin Right to Life Bring Changes?," 19 University of Florida Journal of Law and

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		Public Policy 271, 284-88 (August 2008). (h) A close reading of the Supreme Court's holdings in Regan, FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), Citizens United, Ysursa v. Pocatello Education Association, 129 S. Ct. 1093 (2009), and Agency for International Development supports the constitutionality of the limitations under Code Section 501(c)(3) on independent expenditures and lobbying and issue advocacy. See American Bar Association, Section of Taxation, Comments on Section 501(c)(4) Organizations, May 7, 2014, at 52-56 (available at www.americanbar.org/content/dam/aba/administrative/taxation/policy/050714comments.pdf-411k-2014-05-13). (i) In FEC v. Massachusetts Citizens for Life, Inc., the Court addressed the provisions of FECA prohibiting a corporation from using treasury funds for expenditures for express advocacy, and requiring that the corporation use voluntary contributions to a separate segregated fund or PAC for these expenditures. The Court held that these provisions were unconstitutional as applied to an organization that: (i) is formed for the express purpose of engaging in political advocacy, and is prohibited from engaging in business activities; (ii) does not have any shareholders or others with a claim on its assets or earnings; and (iii) is not formed by a business corporation or labor union, and does not accept contributions from these entities. The Court also held that requiring the organization to use a PAC to make expenditures

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		for express advocacy was unduly burdensome. In reaching this result, the Court rejected the argument that under Regan the availability of an affiliated organization or a PAC for this purpose was constitutionally sufficient. In Regan, the ability to use an affiliated organization or PAC did not infringe on any protected activity, "for there is no right to have speech subsidized by the Government. By contrast, the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment." 479 U.S. at 256 n. 9 (citation omitted). (j) The Court in Citizens United relied on Massachusetts Citizens for Life. Thus, the Court implicitly recognized the continuing validity of the principle that the government does not have any obligation to grant a tax-exemption to subsidize independent expenditures and lobbying and issue advocacy. (k) In Ysursa, the Court upheld a provision of Idaho law that permitted a public employee to elect to have the employer deduct from wages and remit to the union payments for union dues, and prohibited payroll deductions for political activities. In reaching this result, the Court relied on Regan and applied the principle that the government does not have any obligation to assist any person to exercise its First Amendment rights: "The First Amendment prohibits government from 'abridging the freedom of speech,' it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. Idaho's law does not restrict political speech, but

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		rather declines to promote that speech by allowing public employee checkoffs for political activities. Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity. That interest extends to government at the local as well as state level, and nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities." 129 S. Ct. at 1096. (l) The Court in Ysursa also held that since the government does not have any obligation to subsidize or otherwise assist in a person's exercise of its First Amendment rights, the government need only show a rational basis for its treatment. The State's rationale in Ysursa of "avoiding in reality or appearance of government favoritism or entanglement with partisan politics" was sufficient under the rational basis test. 129 S. Ct. at 1098. (m) The lesson of Regan, Massachusetts Citizens for Life, Citizens United, and Ysursa is that when the requirements for tax-exemption are at issue, the rational basis test for constitutionality applies and the requirements will likely be upheld. When a prohibition on express advocacy is at issue, strict scrutiny applies and the prohibition will likely be struck down. (n) The Court's decision in Agency for International Development is consistent with this analysis. The Court,

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		relying on Regan, held that the denial of a tax deduction for lobbying expenses is a permissible Congressional decision not to subsidize lobbying. The Court also held that the ability to use a dual Section 501(c)(3) organization and Section 501(c)(4) structure does not impose an undue burden on protected First Amendment activity. Furthermore, the Court set forth the test for permissible and impermissible conditions on the receipt of government benefits as "conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize – and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." 133 S. Ct. at 2328. Restrictions on political activity involving tax-exemption were permissible conditions that define the limits of the government spending program. See also Cammarano v. United States, 358 U.S. 498, 512-13 (1959) (denial of a business expense deduction for the cost of ads for a ballot measure was not aimed at the suppression of ideas). (o) The remaining constitutional argument against the Section 501(c)(3) limitations on independent expenditures and lobbying and issue advocacy is that under Citizens United and WRTL, the facts and circumstances test is too vague to provide meaningful guidance to those who wish to engage in these activities. The answer to this argument is that under the rational basis test, the strict scrutiny holdings of Citizens United and WRTL do not apply. Nevertheless, there is authority that a facts and circumstances test under the tax laws can trigger vagueness concerns under the First

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		Amendment. See United Cancer Council, Inc. v. Commissioner, 165 F.3d 1173, 1179 (7th Cir. 1999) (facts and circumstances test for political intervention under Code Section 501(c)(3) is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS); Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980) (nonprofit organization with a feminist orientation published a monthly newspaper; definition of "educational" under Treas. Reg. §1.501(c)(3)-1(d)(3) was unconstitutionally vague; regulation provided that an "organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion."). (p) Under Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012), religious organizations can argue that the First Amendment Free Exercise Clause permits a religious organization to engage in campaign activity. The Court held that under the First Amendment Free Exercise Clause, religious organizations enjoyed a ministerial exception to the employment discrimination laws. The Court rejected the argument that under Employment Division v. Smith, 494 U.S. 872 (1990), the Americans With Disabilities Act, as a valid and neutral law of generally applicability, trumped the religious

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		organization's autonomy: It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use [in Smith], is a valid an neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. Smith involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See id., at 877, 110 S. Ct. 1595, 108 L. Ed. 876 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma"). The contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit. [132 S. Ct. at 707] (q) Religious organizations can argue that since Smith does not prohibit the ministerial exception because the exception deals with "an internal church decision that affects the faith and mission of the church itself," the tax laws should not prohibit campaign activity that is religiously motivated and carried out as part of the organization's religious purpose. But see Carl H. Esbeck, "A Religious Organization's Autonomy in Matters of Self-Governance: *Hosanna-Tabor* and the First Amendment," 13 Engage 168, 170 (March 2012) ("We should not suppose that *Hosanna-Tabor* reaches communication to the congregation about everything, even when done by a cleric on a Sunday from the pulpit. Appeals

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		from a church to the effect that the laity should vote against President Obama because he failed to approve the TransCanada Keystone XL pipeline coming out of Alberta is not about church governance. There may well be a Christian view of the environment and the continued use of fossil fuels, but any such religious teaching is remote to the question of a church's self-government.").
		SECTION 501(c)(4) ORGANIZATIONS AND RELATIONSHIP WITH AFFILIATED SECTION 501(c)(3) ORGANIZATIONS
		14. A Section 501(c)(3) organization can create a separately incorporated and affiliated Section 501(c)(4) organization. The Section 501(c)(4) organization can then create a Section 527(f)(3) political organization known as a separate segregated fund ("SSF"), or a PAC. The PAC then makes contributions to candidates and political organizations. Treas. Reg. §1.527-6(f)-(g); Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 329. After Citizens United, either the Section 501(c)(4) organization or its PAC can use its treasury funds to make independent expenditures or electioneering communications, but only the PAC can use its treasury funds make contributions to candidates or parties. The Section 501(c)(4) organization can use its treasury funds to establish, administer, and solicit contributions to the PAC. 2 U.S.C. §§441(b)(B)(2)(C) and 441b(a). See discussion of FECA's requirements for a Section 501(c)(4) organization's establishment of a PAC in Paragraphs 2 to 12 of the FECA column.

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		15. The Section 501(c)(4) organization should keep records and bank accounts separate from those of the Section 501(c)(3) organization. If there are overlapping paid directors, officers, or employees, the organizations should reasonably allocate their time between the organizations based on the activities they work on for the respective organizations. Finally, the organizations should reasonably allocate other shared goods, services, and facilities. If these requirements are not satisfied, the IRS may seek to attribute the activities of the Section 501(c)(4) organization to the Section 501(c)(3) organization. Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000) ("[T]he Church can initiate a series of steps that will provide an alternate means of potential communication. . . . Should the Church proceed to do so, however, it must understand that the related 501(c)(4) organization must be separately incorporated; and it must maintain records that will demonstrate that tax-deductible contributions to the Church have not been used to support the political activities conducted by the 501(c)(4) organization's political action arm."); see also Regan v. Taxation With Representation, 461 U.S. 540, 552-53 (1983) (Blackmun, J., concurring); Treas. Reg. §1.527-2(b)(2) (an organization maintaining a separate segregated fund must keep records that are adequate to verify receipts and disbursements, and identify the exempt function activity for which each expenditure is made); PLR 9850025. 16. With respect to the relationship between a Section 501(c)(3) organization and the PAC of an affiliated Section 501(c)(4)

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		organization:, (a) the Section 501(c)(3) organization cannot control the PAC, such as having the right to appoint or approve the PAC's board of directors; and (b) the Section 501(c)(3) organization's assets, such as its equipment, facilities, goodwill, investments, mailing lists, and personnel, should not be used by the PAC. If these assets are shared between the Section 501(c)(3) organization and the PAC, there must be reasonable allocations of expenses based on arm's length standards, and records kept to substantiate the allocations, such as time spent by shared employees working for each organization. In addition, the Section 501(c)(3) organization may have to make its mailing list available to other political organizations and candidates on the same terms; and (c) the directors, officers, and employees of the Section 501(c)(3) organization who assist the PAC without arm's length compensation must act voluntarily in their individual capacity. See discussion of acting in an individual capacity in Paragraphs 1 to 8 of the I.R.C. column for "Campaign Activities of Section 501(c)(3) Organization's Directors, Officers, and Employees." 17. The 2002 CPE Text contains an extensive discussion of the areas in which a Section 501(c) organization should use the appropriate care so that its relationship with an affiliated Section 501(c)(4) organization does not cause the Section 501(c)(3) organization to violate the prohibition against campaign intervention. "So long as the [Section 501(c)(3) and 501(c)(4)] organizations are kept separate (with appropriate record keeping and fair market reimbursement for

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		facilities and services), the activities of the IRC 501(c)(4) organization or of the PAC will not jeopardize the IRC 501(c)(3) organization's exempt status. See e.g., PLR 2001-03-084 (Oct. 24, 2000)." 2002 CPE Text, at 367. 18. (a) The 2002 CPE Text provides that similarity of names between the Section 501(c)(3) organization, Section 501(c)(4) organization, and its PAC does not cause the PAC's activities to be attributed to the Section 501(c)(3) organization: "[W]hen an organization, such as an IRC 501(c)(4) organization, establishes a federal PAC, it is required to include its full name in the name of the PAC. See 11 C.F.R. §102.14(c). If the IRC 501(c)(4) organization has also established a related IRC 501(c)(3) organization with a similar name, the activities of the IRC 527 organization are not going to be attributed to the IRC 501(c)(3) organization simply because the IRC 501(c)(3) organization and the IRC 501(c)(4) organization have similar names and the name of the IRC 501(c)(4) organization is included in the name of the PAC. There must be something more to indicate that the IRC 501(c)(3) organization is supporting the PAC, for example, the use of the IRC 501(c)(3) organization's tangible or intangible assets." 2002 CPE Text, at 368; see also Center on Corporate Responsibility, Inc. v. Schultz, 368 F. Supp. 863 (D.D.C. 1973) (Section 501(c)(3) organization does not lose tax-exempt status when it establishes an affiliated taxable corporation with a similar name to carry on activities it could tax-exempt status when it establishes an affiliated taxable corporation with a similar name to carry on activities it could

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		not carry on). (b) "An IRC 501(c)(3) organization's resources include intangible assets, such as its logos, trademarks and goodwill, that may not be used to support the political campaign activities of another organization. The licensing of an IRC 501(c)(3) organization's logos or trademarks to an IRC 527 organization may be considered official sanction by the IRC 501(c)(3) organization of the political activities of the IRC 527 organization." 2002 CPE Text, at 369. 19. Although the 2002 CPE Text takes the position that similarity of names does not violate the prohibition, it also states that a Section 501(c)(3) organization can improperly allow its name to be used in joint fundraising with a PAC, and that in determining whether officials of the Section 501(c)(3) organization are acting in their personal capacity or on behalf of the organization when engaging in campaign activity, evidence of acting on behalf of the organization includes any similarity of name between the organization and a PAC. 2002 CPE Text, at 366-69. 20. A Section 501(c)(3) organization's fundraising activities should be separate from the PAC's fundraising activities. The Section 501(c)(3) organization's solicitations should (a) be mailed in separate envelopes and at separate times from the PAC's solicitations; and (b) make no reference to the PAC, such as a flier soliciting funds for the PAC. Similarly, a PAC should not notify donors of the PAC's

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		campaign activities, and simultaneously inform them of the public charity's training program for voter registration and get-out-the-vote drives and the charity's need for funds for the program. 21. The 2002 CPE Text contains the following admonition on joint fundraising: "[A]ny attempt at joint fundraising should be carefully scrutinized from the aspect of whether the IRC 501(c)(3) organization is allowing its name or its goodwill to be used to further an activity forbidden to it. For example, if a well-known IRC 501(c)(3) organization 'jointly' sponsors a fundraising event with a lesser-known PAC, there is a strong suspicion that the IRC 501(c)(3) organization's drawing power is being used to aid the political intervention activities of the PAC." 2002 CPE Text, at 369. See discussion of Section 501(c)(3) organization's fundraising letters in Paragraphs 2 and 3 of the I.R.C. column for "Statutory And Regulatory Provisions On Contributions To And Fundraising For Section 501(c)(3) Organizations." 22. The Section 501(c)(4) organization often wishes to solicit PAC contributions from the members of the Section 501(c)(3) organization. This solicitation raises the issue of how the Section 501(c)(3) organization can give the Section 501(c)(4) organization access to the Section 501(c)(3) organization's mailing list without running afoul of the prohibition on campaign intervention. The Section 501(c)(3) organization can use one of four approaches, which from the riskiest to the safest are as follows:

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		(a) The Section 501(c)(3) organization rents its mailing list at fair market rental for specific Section 501(c)(4) organization PAC solicitations, and the Section 501(c)(3) organization does not participate in drafting the solicitations. The holding of the Court in Regan v. Taxation With Representation, 461 U.S. 540 (1983), supports this approach. In Regan, the Court held that conditioning the tax-exemption of Section 501(c)(3) organizations and the deduction for contributions to Section 501(c)(3) organizations on the insubstantiality limitation is constitutional because the government does not have to subsidize an organization's lobbying through tax benefits. It also held that the government cannot deny a person a benefit because that person exercises a constitutional right. In addition, three Justices took the position in a concurring opinion that the insubstantiality limitation is constitutional when the Section 501(c)(3) organization can use an affiliated, yet separate, Section 501(c)(4) organization to engage in lobbying activities. To satisfy the requirement that the organizations be separate, the Section 501(c)(3) organization and Section 501(c)(4) organization must be separately incorporated, and maintain records showing that the Section 501(c)(4) organization does not use tax-deductible contributions to the Section 501(c)(3) organization for lobbying by the Section 501(c)(4) organization. Therefore, the Section 501(c)(3) organization should be able to rent its mailing list for fair market rental to the Section 501(c)(4) organization for political purposes. Nevertheless, the IRS may take the position that rental of its mailing list exclusively

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		for political purposes constitutes impermissible political activity. (b) The Section 501(c)(3) organization rents its mailing list at fair market rental to its related Section 501(c)(4) organization without restriction as to use. (c) The Section 501(c)(3) organization rents its mailing list at fair market rental to its related Section 501(c)(4) organization to use for nonpolitical communications, such as a request to sign-up for a mailing list or receive policy alerts. The Section 501(c)(4) organization then can communicate further with those who respond to its initial communication. In the further communications, the Section 501(c)(4) organization can make political communications. If the persons who respond become members of the Section 501(c)(4) organization, their names belong to the Section 501(c)(4) organization. Otherwise, since the Section 501(c)(4) organization can solicit only current members of the Section 501(c)(3) organization, the Section 501(c)(4) organization should pay an additional annual fee to the Section 501(c)(3) organization to check on a person's current membership status. (d) The Section 501(c)(3) organization rents its mailing list at fair market rental to all other organizations. See generally Elizabeth Kingsley, "Election Law, Tax Law, and Funding a 'Connected' PAC," Taxation of Exempts, at 44-48 (Nov./Dec. 2009).

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		23. With respect to the charitable contribution/PAC matching program described in Paragraph 11 of the FECA column, the 2002 CPE Text provides, "As long as the IRC 501(c)(3) organization is a passive recipient of the corporate contributions and does not play any part in the solicitation of the PAC funds, the Charity/PAC matching program will not affect its exempt status." 2002 CPE Text, at 387. In addition, with respect to a for-profit corporation, the corporation is not entitled to a charitable deduction, and the employee who makes a contribution to the PAC is not charged with the receipt of compensation income for the charitable contribution. G.C.M. 39,877 (Sept. 8, 1992). REQUIREMENTS FOR TAX-EXEMPTION OF SECTION 501(c)(4) ORGANIZATION 24. (a) A Section 501(c)(4) organization must be "operated exclusively for the promotion of social welfare." I.R.C. §501(c)(4). The text of the Code does not define "social welfare." Under the regulations, promoting social welfare means "primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements." Treas. Reg. §1.501(c)(4)-1(a)(2)(i). The regulations also provide that "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public

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		office." Treas. Reg. §1.501(c)(4)-1(a)(2)(ii); see also Rev. Rul. 76-81, 1976-1 C.B. 156 (organization that advocated anti-abortion legislation qualified under Section 501(c)(4)); Rev. Rul. 71-530, 1971-2 C.B. 237 (organization promoted social welfare when it conducted significant research on tax issues, and its members regularly testified at legislative hearings in favor of and against proposed tax legislation; organization promoted "the common good and general welfare of the community by assisting legislators and administrators concerned with tax policy. Such activity helps the legislators and administrators form better judgments about the legislation. The fact that the organization's only activities may involve advocating changes in law does not preclude the organization from qualifying under §501(c)(4) of the Code"); Rev. Rul. 67-368, 1967-2 C.B. 194 (organization whose primary activity was rating candidates for public office was not exempt under Code Section 501(c)(4) because the activity was not the promotion of social welfare); Rev. Rul. 67-293, 1967-2 C.B. 185 (organization that promoted legislation on animal rights qualified under Section 501(c)(4)); Rev. Rul. 68-656, 1968-2 C.B. 216 (organization that sought legalization of illegal activity qualified under Section 501(c)(4)); PLR 201403019 (organization was not operated primarily to promote social welfare when in Year 1 it spent approximately 60% percent of its revenue on the production and distribution of a flier that encouraged the defeat of a candidate for public office; the distribution of the flier coincided with an electoral campaign; the flier referred to election day, and identified the

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		candidate's position on a public policy issue important to the organization; in Year 2 the organization spent approximately 87.2 % of its revenue compensating one of its directors for his efforts coordinating its activities, website, fundraising, and placement of public materials concerning the organization's mission; these activities were the production and distribution of the flier, and the operation of the website, both of which were campaign intervention, and the creation of an unaired television advertisement that did not further social welfare purposes); PLR 201214035 (organization was not operated exclusively for the promotion of social welfare when it spent 80% of its time supporting the presidential candidacy of M, the former chairman of the N, a political party in foreign country P; organization influences citizens of P to vote for M by distributing the books U, V, and W, supporting M's policies and making the public aware of M's policies by maintaining a Website, which updates all M related information in real time). (b) The IRS has construed Section 501(c)(4) to mean that a Section 501(c)(4) organization can engage in campaign activity if the campaign activity is not its primary activity, and complies with applicable election law. See Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 329 ("Certain broadcast, cable, or satellite communications that meet the definition of 'electioneering communications' are regulated by the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81. An exempt organization that violates the regulatory requirements of BCRA may well jeopardize its exemption or

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		be subject to other tax consequences."); Rev. Rul. 81-95, 1981-1 C.B. 332; G.C.M. 38,215 (Dec. 31, 1979); G.C.M. 36,286 (May 22, 1975); G.C.M. 33,495 (April 27, 1967). (c) The permissible campaign activities of a Section 501(c)(4) organization include the prohibited campaign activities of a Section 501(c)(3) organization. See the authorities cited in Paragraph 28. (d) The Section 501(c)(4) organization's campaign activity must not only not be its primary activity, but the campaign activity, together with all other nonsocial welfare activities, must not be the organization's primary activity. Other nonsocial welfare activities are investment activities, unrelated trade or business activities, social activities for members, and activities for the private benefit of members. 25. (a) The IRS and Treasury issued a Notice of Proposed Rulemaking that sought to provide guidance to Section 501(c)(4) organizations on the political activities related to candidates that would not be considered to promote social welfare. Under the proposed regulations, the promotion of social welfare did not include direct or indirect candidate-related political activity. Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 F.R. 71,535 (Nov. 29, 2013). (b) The proposed regulations were met with a broad array of criticism. In response to this criticism, on May 22, 2014, the IRS issued the following notice regarding changes to the

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		proposed regulations: Last November, Treasury and the IRS proposed a new regulation governing the political activity of section 501(c)(4) organizations. The proposal generated over 150,000 comments – the most comments ever received by Treasury and IRS on a proposed tax regulation. Consistent with our standard rulemaking process, we intend to review those comments carefully, take into account public feedback, and consider any necessary changes. Consistent with what Commissioner Koskinen has previously stated, it is likely that we will make some changes to the proposed regulation in light of the comments we have received. Given the diversity of views expressed and the volume of substantive input, we have concluded that it would be more efficient and useful to hold a public hearing after we publish the revised proposed regulation. Treasury and the IRS remain committed to providing updated standards for tax-exemption that are fair, clear, and easier to administer. [IRS Update on the Proposed New Regulation on 501(c)(4) Organizations, May 22, 2014 (available at http://www.irs.gov/uac/Newsroom?IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations)] (c) The proposed regulations at Treas. Reg. §1.501(c)(4)-1(a)(2)(iii) defined candidate-related political activity as follows: (iii) Definition of candidate-related political activity--

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		(A) In general. For purposes of this section, candidate-related political activity means: (1) Any communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section) expressing a view on, whether for or against, the selection, nomination, election, or appointment of one or more clearly identified candidates or of candidates of a political party that- (i) Contains words that expressly advocate, such as "vote," "oppose," "support," "elect," "defeat," or "reject;" or (ii) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party; (2) Any public communication (defined in paragraph (a)(2)(iii)(B)(5) of this section) within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election; (3) Any communication the expenditures for which are reported to the Federal Election Commission, including independent expenditures and electioneering communications; (4) A contribution (including a gift, grant, subscription, loan,

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		advance, or deposit) of money or anything of value to or the solicitation of contributions on behalf of- (i) Any person, if the transfer is recognized under applicable federal, state, or local campaign finance law as a reportable contribution to a candidate for elective office; (ii) Any section 527 organization; or (iii) Any organization described in section 501(c) that engages in candidate-related political activity within the meaning of this paragraph (a)(2)(iii) (see special rule in paragraph (a)(2)(iii)(D) of this section); (5) Conduct of a voter registration drive or "get-out-the-vote" drive; (6) Distribution of any material prepared by or on behalf of a candidate or by a section 527 organization including, without limitation, written materials, and audio and video recordings; (7) Preparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide); or (8) Hosting or conducting an event within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the

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		program. (B) Related definitions. The following terms are defined for purposes of this paragraph (a)(2)(iii) only: (1) "Candidate" means an individual who publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not such individual is ultimately selected, nominated, elected, or appointed. Any officeholder who is the subject of a recall election shall be treated as a candidate in the recall election. (2) "Clearly identified" means the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by reference, such as by use of the candidate's recorded voice or of terms such as "the Mayor," "your Congressman," "the incumbent," "the Democratic nominee," or "the Republican candidate for County Supervisor." In addition, a candidate may be "clearly identified" by reference to an issue or characteristic used to distinguish the candidate from other candidates. (3) "Communication" means any communication by whatever means, including written, printed, electronic (including Internet), video, or oral communications. (4) "Election" means a general, special, primary, or runoff

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		election for federal, state, or local office; a convention or caucus of a political party that has authority to nominate a candidate for federal, state or local office; a primary election held for the selection of delegates to a national nominating convention of a political party; or a primary election held for the expression of a preference for the nomination of individuals for election to the office of President. A special election or a runoff election is treated as a primary election if held to nominate a candidate. A convention or caucus of a political party that has authority to nominate a candidate is also treated as a primary election. A special election or a runoff election is treated as a general election if held to elect a candidate. Any election or ballot measure to recall an individual who holds state or local elective public office is also treated as a general election. (5) "Public communication" means any communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section)- (i) By broadcast, cable, or satellite; (ii) On an Internet Website; (iii) In a newspaper, magazine, or other periodical; (iv) In the form of paid advertising; or (v) That otherwise reaches, or is intended to reach, more than 500 persons.

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		(6) "Section 527 organization" means an organization described in section 527(e)(1) (including a separate segregated fund described in section 527(f)(3)), whether or not the organization has filed notice under section 527(i). (C) Attribution. For purposes of this section, activities conducted by an organization include activities paid for by the organization or conducted by an officer, director, or employee acting in that capacity or by volunteers acting under the organization's direction or supervision. Communications made by an organization include communications the creation or distribution of which is paid for by the organization, or that are made in an official publication of the organization (including statements or material posted by the organization on its Website), as part of the program at an official function of the organization, by an officer or director acting in that capacity, or by an employee, volunteer, or other representative authorized to communicate on behalf of the organization and acting in that capacity. (D) Special rule regarding contributions to section 501(c) organizations. For purposes of paragraph (a)(2)(iii)(A)(4) of this section, a contribution to an organization described in section 501(c) will not be treated as a contribution to an organization engaged in candidate-related political activity if- (1) The contributor organization obtains a written

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		representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in such activity (and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable); and (2) The contribution is subject to a written restriction that it not be used for candidate-related political activity within the meaning of this paragraph (a)(2)(iii). (d) It is important to note that the proposed regulations cast a wide net over the activities covered by the definition of candidate-related political activity. The following activities were covered: (i) solicitation of contributions to a Section 527 organization covers a Section 501(c)(4) organization's own PAC; (ii) contributions or grants by Section 501(c)(4) organizations to any Section 501(c) organization (Section 501(c)(3) charitable, educational, and religious organizations, and hospitals, Section 501(c)(5) labor unions, and Section 501(c)(6) trade associations) that engages in any candidate-related political activity regardless of whether the contribution or grant is restricted or otherwise used for nonpolitical activity. The proposed regulations do not provide guidance as to the time period that applies to determine the recipient's status as a group that does not engage in candidate-related political activity. The entire amount of the contribution or grant is treated as candidate-

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		related political activity by the Section 501(c)(4) organization regardless of the amount of candidate-related political activity that the recipient organization conducts with the contribution or grant, or with other funds; (iii) with respect to contributions or grants by Section 501(c)(4) organizations to Section 501(c) organizations, the proposed regulations contain a safe harbor that requires the recipient organization to represent in writing that it does not engage in candidate-related political activity. If the recipient organization is uncertain at the time of the grant as to whether it will engage in this activity during the remainder of the current taxable year or in a future taxable year, it will be unable to make this representation; (iv) with respect to contributions or grants by Section 501(c)(4) organizations to Section 501(c) organizations, if the Section 501(c)(4) organization does not obtain the written representation from the recipient organization, the entire amount of the contribution or grant is treated as candidate-related political activity by the Section 501(c)(4) organization regardless of the amount of candidate-related political activity that the recipient organization conducts with the contribution or grant, or with other funds; (v) with respect to contributions or grants by Section 501(c)(4) organizations to Section 501(c) organizations that engage in candidate-related political activity, the provision applies to advances. As a result, the Section 501(c)(4)

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		organization must obtain the written representation from a related organization to which it provides payroll and other administrative services, regardless of whether the recipient organization later reimburses the Section 501(c)(4) organization; (vi) with respect to contributions or grants by Section 501(c)(4) organizations to Section 501(c) organizations that engage in candidate-related political activity, the provision applies to transfers to affiliated organizations, such as transfers between a national organization and its state and local chapters. The provision would prevent transfers from Section 501(c)(4) organizations to their affiliated Section 501(c)(3) organizations that engage in nonpartisan activities that are permissible for Section 501(c)(3) organizations; (vii) express advocacy and its functional equivalent regarding the appointment, nomination, or confirmation of a clearly identified person to a federal, state, or local executive branch or judicial position. Under current law, these activities constitute lobbying, and not campaign intervention; (viii) electioneering communications that are defined more broadly than FECA's definition. The proposed regulations define electioneering communications as any public communication within thirty days of a primary election or sixty days of a general election that refers without express advocacy or its functional equivalent to one or more clearly-

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		identified federal, state, or local candidates, including an incumbent officeholder, in that election, or, in the case of a general election, refers to one or more political parties in that election. Public communication means messages via broadcast, cable, satellite, Website, newspaper, magazine, or other periodical, any form of paid advertising, or that are otherwise intended to or do reach more than 500 persons. Under FECA, electioneering communications are limited to broadcast, cable, and satellite communications. 2 U.S.C. §434(f)(3)(A)(i); (ix) the definition of public communication covers not only television and radio ads that refer to a candidate, but also letters to the editor and op-ends that refer to a candidate, participation in panel discussions, and public events sponsored by the Section 501(c)(4) organization if more than 500 persons are in attendance or have electronic access to the event. It would also cover telephone calls intended to reach, or that reaches, more than 500 persons, such as polling activity that seeks to obtain a statistically valid sample; (x) the definition of public communication covers Internet communications. The definition under FEC regulations excludes Internet communications other than communications placed for a fee on another organization's Website. 11 C.F.R. §100.26; (xi) the definition of public communication does not contain

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		any geographic limitation. For example, a newspaper advertisement in New York that refers to the "Collins bill" if Collins is running for re-election in Maine would be candidate-related political activity. The definition under FECA requires the communication to be targeted to the relevant electorate, which means that it can be received by 50,000 or more persons in the congressional district for a House candidate, or in the state for a Senate candidate. 2 U.S.C. §434(f)(3)(C); 11 C.F.R. §100.29(a)(5); (xii) the definition of a clearly identified candidate covers a reference to an issue or characteristic used to distinguish the candidate from other candidates. For example, does this definition apply to a reference to "supporters of Obamacare?" The definition of clearly identified under FECA does not include this provision. 2 U.S.C. §434(f)(3)(A)(i); 11 C.F.R. §100.29(b)(2); (xiii) under WRTL and Citizens United, the provisions on electioneering communications under FECA no longer serve as a substantive limitation on permissible issue advocacy; rather they impose disclosure obligations. The provisions on electioneering communications under the proposed regulations limit the amount of issue advocacy; (xiv) materials on a Section 501(c)(4) organization's Website during the applicable windows that are electioneering communications. The proposed regulations cover these materials regardless of whether they pertain only

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		to an incumbent's official conduct, such as his or her voting record, or to issue advocacy, and regardless of whether they were posted months or years before the applicable windows. This rule forces a Section 501(c)(4) organization to choose between counting a portion of its Website costs as candidate-related political activity, or scrubbing its Website of the electioneering communications during the applicable time periods; (xv) links on a Section 501(c)(4) organization's Website to another Website that contains candidate-related political activity, even if the other Website is a bona fide news site; (xvi) nonpartisan voter registration and get-out-the-vote drives. The proposed regulations go so far as to cover a Section 501(c)(4) organization's efforts to encourage citizens to participate in a referendum election even if there are not any candidates on the ballot. Under FECA, nonpartisan activity designed to encourage individuals to register to vote or to vote is excluded from the definition of expenditure. 2 U.S.C. §431(8)(B)(i); (xvii) nonpartisan voter guides that refer to any clearly identified candidate, or in a general election, any political party, including any material accompanying the voter guide. The proposed regulations did not provide guidance on the definition of voter guide. In addition, if a voter guide is published on a Section 501(c)(4) organization's Website, do all other materials on the Website accompany the voter

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		guide? If a voter guide is distributed by mail, do all other communications in the same envelope, even if they do not refer to a candidate or political party, accompany the voter guide? Furthermore, the proposed regulations did not provide guidance for determining what constitutes a reference to a political party. Does a reference to "progressive candidates" or "conservative candidates" suffice?; (xviii) nonpartisan candidate debates within thirty days of a primary election or sixty days of a general election; and (xix) appearances and speeches by an incumbent officeholder in an official, noncandidate capacity at a nonpartisan event sponsored by the Section 501(c)(4) organization within thirty days of a primary election or sixty days of a general election, and the incumbent is also a candidate in the election. In contrast, FEC regulations permit candidate visits to a corporation's offices to communicate to employees outside the restricted class as long as all other candidates who request to appear are given a similar opportunity. Unless clearly impractical, the corporation must make similar times and locations available to all candidates who wish to appear. The costs incurred by the corporation for the appearance are not treated as in-kind contributions or expenditures. 11 C.F.R. §114.4(b)(1). Furthermore, under the regulations of the federal Office of Personnel Management, a federal officeholder running for re-election must pay the costs of travel to an event from

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		campaign funds only if political activity occurs at the event. When the travel entails attendance at political events and the performance of official duties, the officeholder must apportion the costs based on the time spent on political activities and the time spent on official duties. 5 C.F.R. §734.503. Political activity is defined as an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group. 5 C.F.R. §734.101. Thus, when an officeholder attends an event to perform official duties, whether before, during, or after the period before an election, the taxpayer, and not his or her campaign, bears the cost. (e) Under the proposed regulations, the definition of candidate included persons who have taken steps to seek nonelective public office, or positions as officers of nongovernmental political organizations. It also included persons who are proposed by others as candidates, such as bloggers and news media outlets, but whom the Section 501(c)(4) organization has not referred to as a candidate. (f) In determining the amount of candidate-related political activity, volunteer activity was counted. The proposed regulations did not provide guidance as to how to measure volunteer activity, such as the number of volunteers involved, the time they spend, the value of services provided, or any particular combination of these factors. The proposed regulations also did not provide guidance on the effect of volunteer activity on the determination of the

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		organization's primary purpose. (g) The proposed regulations restricted more political activity by Section 501(c)(4) organizations, which are not statutorily prohibited from engaging in political activity, than by Section 501(c)(3) organizations, which are statutorily prohibited from engaging in campaign intervention. In Rev. Rul. 2007-41, 2007-1 C.B. 1421, the IRS permitted Section 501(c)(3) organizations to engage in the political activities in the following situations that the proposed regulations would restrict: (i) Situations 7 and 8, candidate appearances before an election; (ii) Situations 10 and 11, candidate attendance at a regular meeting before an election; (iii) Situation 12, publication of an unsolicited announcement of candidacy in regular newsletter; (iv) Situation 14, paid mass media advocacy that criticizes Senator C's position on legislation and encourages a call to him regarding an upcoming vote in Congress shortly before an election in which he is a candidate; (v) Situation 17, nondiscriminatory rental of facility to candidate; (vi) Situation 19, links to candidate Websites; and (vii) Situation 20, links to Websites that contain articles regarding treatment programs and editorials endorsing candidates. (h) The broad definition of candidate-related political activity threatened both the ability of an organization to maintain its tax-exemption under Section 501(c)(4), and its ability to qualify for exemption as a political organization under Section 527. Under the Section 501(c)(4) regulations,

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		organizations that engage in some political activity, but are not primarily engaged in political activity, qualify for exemption under Section 501(c)(4). Under Section 527, a political organization must be primarily engaged in exempt function activity; organizations that are not primarily engaged in exempt function activity do not qualify for exemption under Section 527. Under the broad definition of candidate-related political activity, many Section 501(c)(4) organizations would be primarily engaged political activity, rather than social welfare activity, and would lose their Section 501(c)(4) status. However, the exempt functions that Section 527 organizations must be primarily engaged in are much narrower than candidate-related political activity. As a result, disqualified Section 501(c)(4) organizations would be unable to qualify for tax-exemption under Section 527. Thus, if the Section 501(c)(4) organization did not conduct candidate-related political activity, and the particular activity was not permissible exempt-function activity for a Section 527 organization under Code Section 527(e)(2), the organization would find it impossible to conduct that particular activity. For the definition of exempt functions, see Paragraphs 28 to 38 below. (i) Section 501(c)(4) organizations can engage in exempt function activities, but must pay a tax on these activities under Section 527(b) and (e)(2). Under the proposed regulations, Section 501(c)(4) organizations could not count candidate-related political activity as social welfare activity, but must pay tax on the narrower class of exempt function

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		activity. This narrower class includes issue advocacy that identifies a candidate. Thus, the regulatory regimes of Section 501(c)(4) and 527 would have been inconsistent with each other. (j) Although the proposed regulations did not impose additional disclosure requirements, they would likely have had that effect. The definition of candidate-related political activity was sufficiently broad that many Section 501(c)(4) organizations would have avoided this activity to maintain tax-exempt status, or to avoid the tax on exempt-function expenditures and investment income under Code Section 527(f)(1)-(2). These organizations would likely then have had their Section 527 PACs conduct this activity. PACs must publicly disclose their contributions and expenditures in periodic reports. Even this approach might not have been viable when the candidate-related political activity under Section 501(c)(4) did not qualify as an exempt function under Section 527. (k) The limitation on electioneering communications was effectively a limitation on lobbying by Section 501(c)(4) organizations, especially grassroots lobbying. This limitation raises the constitutional issue of whether the proposed regulations impermissibly denied Section 501(c)(3) organizations the ability to engage in lobbying. Section 501(c)(3) organizations are permitted to engage in lobbying only if it is an insubstantial portion of their activities. In Regan v. Taxation With Representation, 461

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		U.S. 540 (1983), the United States Supreme Court upheld the insubstantiality limitation against First Amendment and equal protection attack, holding that "tax exemptions and tax deductibility are a form of [federal] subsidy," and "Congress is not required by the First Amendment to subsidize lobbying." 461 U.S. at 544, 546. In an important concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, wrote that although the First Amendment does not require the government to subsidize lobbying through a tax deduction, conditioning the deduction on a complete prohibition on lobbying would be unconstitutional since it would deny "a significant benefit to organizations choosing to exercise their constitutional rights." 461 U.S. at 552. This concern was addressed by the ability of a Section 501(c)(3) organization to use an affiliated, yet separate, Section 501(c)(4) organization to engage in lobbying. If the Section 501(c)(3) organization's ability to use a Section 501(c)(4) organization for lobbying is limited, the limitation creates constitutional issues: "Should the IRS attempt to limit the control these organizations exercise over the lobbying of their §501(c)(4) affiliates, the First Amendment problems would be insurmountable." 461 U.S. at 553. Justice Blackmun also wrote, "[A]n attempt to prevent §501(c)(4) organizations from lobbying explicitly on behalf of their §501(c)(3) affiliates would perpetuate §501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. In my view, any such restrictions would render the statutory

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		scheme unconstitutional." 461 U.S. at 553-54. 26. The IRS looks at all the facts and circumstances in determining an organization's primary activity. Rev. Rul. 68-45, 1968-1 C.B. 259. The most important ones are the portion of annual gross revenues and total expenses used for the organization's campaign activities and social welfare activities, and the number of beneficiaries of each activity. People's Educational Camp Society v. Commissioner, 331 F.2d 923, 931 (2d Cir. 1964), cert. denied, 379 U.S. 389 (1964); Rev. Rul. 68-45, 1968-1 C.B. 259; PLR 201224034 (determination of primary purpose is a facts and circumstances test; the pertinent factors are the manner in which the organization's activities are conducted; the resources used in conducting the activities; the time devoted to activities by employees and volunteers; and the amount of funds received from and devoted to particular activities); T.A.M. 200245064 (Nov. 8, 2002); Raymond Chick and Amy Henchey, "Political Organizations and IRC 501(c)(4)," IRS FY 1995 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, at 2 (determination of Section 501(c)(4) organization's primary activity is a facts and circumstances test; the relevant factors are "the amount of funds received from and devoted to particular activities; other resources used in conducting such activities, such as buildings and equipment; the time devoted to activities (by volunteers as well as employees); the manner in which the organization's activities are conducted; and the purposes furthered by various activities."); Schedule C of IRS

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		Form 990 (Section 501(c)(4) organization must file an annual information return on Form 990 with the IRS; on Schedule C of Form 990 the organization must: (a) describe its direct and indirect political campaign activities; (b) report the amount spent conducting campaign activities and the number of hours that volunteers spent to conduct the activities; (c) report the amount directly spent for certain political activities and the amounts contributed to other organizations for the activities; (d) report whether a Form 1120-POL (the tax return filed by organizations that owe the Section 527(f) tax) was filed for the year; and (e) report the name, address, and employer identification number of each Section 527 organization (e.g., a PAC or Super PAC) to which the Section 501(c)(4) organization made payments and the amount of the payments, and state whether the amounts were paid from internal funds or were contributions received and directly transferred to a separate political organization) (available at http://www.irs.gov/pub/irs-pdf/f990sc.pdf). 27. (a) A Section 501(c)(4) organization that engages in campaign activity can expend funds for this purpose in two ways. First, it can expend funds from its general treasury. Second, it can form a separate segregated fund or PAC that expends the PAC's funds. (b) In the first situation, the Section 501(c)(4) organization is subject to tax on the lesser of: (i) its net investment income for the taxable year (income from dividends, interest, rents, royalties, and gains from the sale or exchange of capital

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		assets, less the investment management expenses and other costs incurred in producing the investment income, and losses from the sale or exchange of capital assets); and (ii) the amount expended on an exempt function in the taxable year. Tax is imposed at the highest corporate rate under Code Section 11(b). I.R.C. §527(f)(1)-(2). Accordingly, if a Section 501(c)(4) organization has investment income, conducting political activity will likely trigger a tax liability. (c) An exempt function means influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, regardless of whether the individual or electors are selected, nominated, elected, or appointed. I.R.C. §527(e)(2). Under the regulations, an exempt function includes all activities that are directly related to and support these functions. Treas. Reg. §1.527-1(c)(1). (d) Expenditures of a Section 501(c) organization that are otherwise allowable under FECA or similar state laws are for an exempt function only to the extent provided in Treas. Reg. §1.527-6(b)(3). Treas. Reg. §1.527-6(b)(1)(i). Since regulations under Treas. Reg. §1.527-6(b)(3) have not been issued, these expenditures are not subject to tax under Code Section 527(f). Examples of these expenditures are those for partisan engagement with the organization's members, and establishing, administering, and fundraising for a PAC. As a

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		matter of sound tax policy, it is unclear why expenditures for member communications and PAC administration are not subject to tax, but expenditures for other political activity are subject to tax. (e) Similarly, indirect expenses are treated as expenditures for an exempt function only to the extent provided in Treas. Reg. §1.527-6(b)(2). Treas. Reg. §1.527-6(b)(1)(i). Since regulations under Treas. Reg. §1.527-6(b)(2) also have not been issued, expenditures for indirect expenses are not subject to tax under Code Section 527(f). Indirect expenses are those not directly related to influencing or attempting to influence the election process, but are necessary to support the directly related activities. Examples of indirect expenses are those for support functions, such as administrative, fundraising, overhead, and recordkeeping. Treas. Reg. §1.527-2(c)(2). In addition, the IRS has ruled in private letter rulings that indirect expenses also include (i) acquisition and enhancement of voter lists to target distribution of materials; (ii) candidate research; (iii) polling and focus groups; and (iv) engagement with other organizations the is not voter contact. PLR 9808037; 9725036; and 9652026. (f) Expenditures directly related for an exempt function are subject to tax. Treas. Reg. §1.527-6(b)(1)(i). Directly related expenses are those made for activities that are directly related to and support the process of influencing or attempting to influence the election process. Treas. Reg. §1.527-2(c)(1).

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		(g) Expenditures for nonpartisan activities that are not exempt functions are not subject to tax. (h) In the second situation, the Section 501(c)(4) organization forms a PAC, which enables the Section 501(c)(4) organization to escape the tax under Code Section 527(f)(1)-(2). The PAC must be one that the Section 501(c)(4) organization can form under FECA, any similar state statute, or any other state statute that permits the "segregation of dues moneys for exempt functions." I.R.C. §527(f)(3). Any contributions that the Section 501(c)(4) organization makes to the PAC are still subject to the tax. See TAM 9433001 (Section 501(c)(6) trade association taxable on contributions it makes to an affiliated PAC). (i) The PAC is treated as a separate political organization subject to tax under Code Section 527. The PAC is subject to tax on its investment income, which does not include contributions and fundraising proceeds. The PAC is not subject to tax on its exempt function income. I.R.C. §527(b)-(c). (j) The PAC's exempt function income must be derived from permissible sources. The permissible sources are contributions, membership dues, and proceeds from political fundraising events and bingo games. I.R.C. §527(c)(3)(A)-(D). Income derived from other sources is not treated as exempt function income regardless of whether it is used for exempt function expenditures, or segregated for this use in

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		the future. The income from permissible sources must be segregated and used exclusively for exempt functions. I.R.C. §527(c)(3). A segregated fund is defined as "a fund which is established and maintained by a political organization or an individual separate from the assets of the organization or the personal assets of the individual." Treas. Reg. §1.527-2(b)(1). A fund is not properly segregated if "more than insubstantial amounts" of funds are derived from impermissible sources. Id. EXEMPT FUNCTION AND CAMPAIGN INTERVENTION 28. (a) The critical issue in determining whether a Section 501(c)(4) organization is subject to the Section 527(f) tax is the definition of exempt function. This definition is important to Section 501(c)(3) organizations because exempt function under Code Section 527(e)(2) substantially overlaps with campaign intervention under Code Section 501(c)(3). See PLR 199925051 ("A similar analysis [for whether voting records and voter guides violate the Section 501(c)(3) campaign intervention prohibition] may be used to determine the types of voter guides and voting records that would qualify as an exempt function activity under Section 527(e)(2)."); PLR 9808037 ("[T]he fund's voter information material, including voter guides and voting records, would be prohibited political intervention for a section 501(c)(3) organization, and are, correspondingly, for an exempt function within the meaning of section 527(e)(2)."); PLR 9652026 ("[T]he Fund's voter guides and voting records

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		would be prohibited political intervention for a section 501(c)(3) organization, and are, correspondingly, for an exempt function within the meaning of section 527(e)(2)."). (b) Code Section 527(e)(2) defines exempt function as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-President electors, regardless of whether the individual or electors are selected, nominated, elected, or appointed." 29. The similarities and differences between Section 527(e)(2) exempt function and Section 501(c)(3) campaign intervention are as follows: (a) Efforts to influence executive branch and judicial appointments are not campaign intervention, but are exempt functions. G.C.M. 39,694 (Feb. 1, 1988) (expenditures to oppose a federal judicial nominee); IRS Notice on Attempts to Influence Judicial Appointments by Exempt Organizations (July 21, 2005) ("Unlimited lobbying to influence Senate confirmation of judicial appointments by section 527 organizations is permitted. Under the Code, exempt function activity for political organizations includes expenditures for the purpose of influencing the appointment of an individual to public office. . . . Social welfare organizations under section 501(c)(4), labor, agricultural, or horticultural

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		organizations under section 501(c)(5), and business leagues under Section 501(c)(6) may engage in unlimited lobbying in furtherance of their exempt purposes.") (available at http://www.irs.gov/charities/article/0,,id=141372,00.html). (b) Appointments made to fill vacancies in elective offices due to death, disability, recall, and resignation are not campaign intervention, but are exempt functions. (c) Impeachment proceedings conducted by the legislature are neither campaign intervention nor an exempt function. The organization must also determine whether efforts to influence the outcome of impeachment proceedings promote the Section 501(c)(3) organization's exempt purpose, or the Section 501(c)(4) organization's social welfare purpose. (d) Popular votes to remove or retain an appointed official, such as a judge, are both campaign intervention and an exempt function. (e) Popular votes to recall an officeholder and to replace a recalled officeholder, regardless of their classification under state law as a ballot measure, are both campaign intervention and an exempt function. (f) Proceedings to determine the outcome of an election, such as recounts and litigation, are probably both campaign intervention and an exempt function. See PLR 199925051 ("Litigation to force or resist a recount, to attack or defend a contestant accused of violating election laws, or to invalidate

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		or uphold a ballot measure linked to the candidate selection process, falls within the meaning of attempting to influence the election of an individual, and is therefore an exempt function."). (g) Proceedings to select persons to party offices are campaign intervention only if the office is a public office, e.g., a precinct committee person, and are an exempt function regardless of whether the party office is a public office. See Paragraphs 3 and 4 for a discussion of the definition of public office. 30. The IRS ruled in Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 330, that when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances must be considered in determining whether the expenditure is for an exempt function. Factors that tend to show that the communication is for an exempt function, include, but are not limited to, the following: (a) The communication identifies a candidate for public office; (b) The timing of the communication coincides with an electoral campaign; (c) The communication targets voters in a particular election; (d) The communication identifies the candidate's position on

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		the public policy issue that is the subject of the communication; (e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and (f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue. 31. Factors that tend to show that the communication is not for an exempt function include, but are not limited to, the following: (a) The absence of any one or more of the factors listed in Paragraph 30; (b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence; (c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication); (d) The communication identifies the candidate solely as a

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		government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who votes on the legislation); and (e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication. 2004-4 I.R.B. 328, 330. 32. In Rev. Rul. 2004-6, the IRS provides four examples of whether a Section 501(c)(4) organization's advocacy communications relating to a public policy issue come within the definition of an exempt function, one example for a Section 501(c)(5) labor organization, and one example for a Section 501(c)(6) trade association. All the examples assume that the Section 501(c)(4) organization expends funds from its general treasury, and all advocacy communications identify a candidate in an election, target the voters in the election, and solicit contributions. By including the solicitation of contributions in each example, the IRS shows that the presence or absence of solicitations does not make a difference in the result. In light of the substantial overlap between Section 501(c)(3) prohibited campaign intervention and Section 527(e)(2) exempt function, the examples dealing with exempt function provide guidance by analogy for determining whether issue advocacy by a Section 501(c)(3) organization violates the prohibition against campaign intervention. The first example for a Section 501(c)(4) organization provides:

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		Situation 3. P, an entity recognized as tax-exempt under §501(c)(4), advocates for better health care. Senator D represents State W in the United States Senate. P prepares and finances a full-page newspaper advertisement that is published repeatedly in several large circulation newspapers in State W beginning shortly before an election in which Senator D is a candidate for re-election. The advertisement is not part of an ongoing series of substantially similar advocacy communications by P on the same issue. The advertisement states that a public hospital is needed in a major city in State W but that the public hospital cannot be built without federal assistance. The advertisement further states that Senator D has voted in the past year for two bills that would have provided the federal funding necessary for the hospital. The advertisement then ends with the statement "Let Senator D know you agree about the need for federal funding for hospitals." Federal funding for hospitals has not been raised as an issue distinguishing Senator D from any opponent. At the time the advertisement is published, a bill providing federal funding for hospitals has been introduced in the United States Senate, but no legislative vote or other major legislative activity on that bill is scheduled in the Senate. Under the facts and circumstances in Situation 3, the advertisement is for an exempt function under §527(e)(2). P's advertisement identifies Senator D, appears shortly before an election in which Senator D is a candidate, and targets voters in that election. Although federal funding of hospitals

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		has not been raised as an issue distinguishing Senator D from any opponent, the advertisement identifies Senator D's position on the hospital funding issue as agreeing with P's position, and is not part of an ongoing series of substantially similar advocacy communications by P on the same issue. Moreover, the advertisement does not identify any specific legislation and is not timed to coincide with a legislative vote or other major legislative action on the hospital funding issue. Based on these facts and circumstances, the amount expended by P on the advertisement is an exempt function expenditure under §527(e)(2) and is subject to tax under §527(f)(1). 2004-4 I.R.B. 328, 331. 33. The IRS used a similar example as Situation 3 in Paragraph 32 in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 1, at 9 (Nov. 2013), but changed the facts to provide that the bill was scheduled for a vote before the election. This fact led the IRS to find that the church did not violate the prohibition against campaign intervention: Example 1: Church O, a section 501(c)(3) organization, prepares and finances a full page newspaper advertisement that is published in several large circulation newspapers in State V shortly before an election in which Senator C is a candidate for nomination in a party primary. Senator C is the incumbent candidate in a party primary. The advertisement states that a pending bill in the United States Senate would provide additional opportunities for State V residents to

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		participate in faith-based programs by providing funding to such church-affiliated programs. The advertisement ends with the statement "Call or write Senator C to tell him to vote for this bill, despite his opposition in the past." Funding for faith-based programs has not been raised as an issue distinguishing Senator C from any opponent. The bill is scheduled for a vote before the election. The advertisement identifies Senator C's position as contrary to O's position. Church O has not violated the political intervention prohibition. The advertisement does not mention the election or the candidacy of Senator C or distinguish Senator C from any opponent. The timing of the advertising and the identification of Senator C are directly related to a vote on the identified legislation. The candidate identified, Senator C, is an officeholder who is in a position to vote on the legislation. 34. The second example for a Section 501(c)(4) organization is as follows: Situation 4. R, an entity recognized as tax-exempt under §501(c)(4), advocates for improved public education. Governor E is the governor of State X. R prepares and finances a radio advertisement urging an increase in state funding for public education in State X, which requires a legislative appropriation. The radio advertisement is first broadcast on several radio stations in State X beginning shortly before an election in which Governor E is a candidate for re-election. The advertisement is not part of an ongoing series of substantially similar advocacy communications by R

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REGULATORY PROVISIONS ON CONTRIBUTIONS, EXPENDITURES, AND ELECTIONEERING		
		on the same issue. The advertisement cites numerous statistics indicating that public education in State X is under-funded. While the advertisement does not say anything about Governor E's position on funding for public education, it ends with "Tell Governor E what you think about our under-funded schools." In public appearances and campaign literature, Governor E's opponent has made funding of public education an issue in the campaign by focusing on Governor E's veto of an income tax increase the previous year to increase funding of public education. At the time the advertisement is broadcast, no legislative vote or other major legislative activity is scheduled in the State X legislature on state funding of public education. Under the facts and circumstances in Situation 4, the advertisement is for an exempt function under §527(e)(2). R's advertisement identifies Governor E, appears shortly before an election in which Governor E is a candidate, and targets voters in that election. Although the advertisement does not explicitly identify Governor E's position on the funding of public schools issue, that issue has been raised as an issue in the campaign by Governor E's opponent. The advertisement does not identify any specific legislation, is not part of an ongoing series of substantially similar advocacy communications by R on the same issue, and is not timed to coincide with a legislative vote or other major legislative action on that issue. Based on these facts and circumstances, the amount expended by R on the advertisement is an exempt function expenditure under §527(e)(2) and is subject to tax

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REGULATORY PROVISIONS ON CONTRIBUTIONS, EXPENDITURES, AND ELECTIONEERING		
		under §527(f)(1). 2004-4 I.R.B. 328, 331. The IRS used a similar example in IRS Fact Sheet 2006-17, Example 15 (Feb. 2006), Rev. Rul. 2007-41, Situation 15, 2007-25 I.R.B. 1421, 1425 (June 18, 2007), and IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 2, at 9 (Nov. 2013). The IRS concluded that the organization engaged in campaign intervention. 35. The third example for a Section 501(c)(4) organization is as follows: Situation 5. S, an entity recognized as tax-exempt under §501(c)(4), advocates to abolish the death penalty in State Y. Governor F is the governor of State Y. S regularly prepares and finances television advertisements opposing the death penalty. These advertisements appear on several television stations in State Y shortly before each scheduled execution in State Y. One such advertisement opposing the death penalty appears on State Y television stations shortly before the scheduled execution of G and shortly before an election in which Governor F is a candidate for re-election. The advertisement broadcast shortly before the election provides statistics regarding developed countries that have abolished the death penalty and refers to studies indicating inequities related to the types of persons executed in the United States. Like the advertisements appearing shortly before other scheduled executions in State Y, the advertisement notes that

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		Governor F has supported the death penalty in the past, and ends with the statement, "Call or write Governor F to demand that he stop the upcoming execution of G." Under the facts and circumstances in Situation 5, the advertisement is not for an exempt function under §527(e)(2). S's advertisement identifies Governor F, appears shortly before an election in which Governor F is a candidate, targets voters in that election, and identifies Governor F's position as contrary to S's position. However, the advertisement is part of an ongoing series of substantially similar advocacy communications by S on the same issue and the advertisement identifies an event outside the control of the organization (the scheduled execution) that the organization hopes to influence. Further, the timing of the advertisement coincides with this specific event that the organization hopes to influence. The candidate identified is a government official who is in a position to take action on the public policy issue in connection with the specific event. Based on these facts and circumstances, the amount expended by S on the advertisements is not an exempt function expenditure under §527(e)(2) and is not subject to tax under §527(f)(1). 2004-4 I.R.B. 328, 332. 36. The fourth example for a Section 501(c)(4) organization is as follows: Situation 6. T, an entity recognized as tax-exempt under §501(c)(4), advocates to abolish the death penalty in State Z.

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		Governor H is the governor of State Z. Beginning shortly before an election in which Governor H is a candidate for re-election, T prepares and finances a television advertisement broadcast on several television stations in State Z. The advertisement is not part of an ongoing series of substantially similar advocacy communications by T on the same issue. The advertisement provides statistics regarding developed countries that have abolished the death penalty, and refers to studies indicating inequities related to the types of persons executed in the United States. The advertisement calls for the abolishment of the death penalty. The advertisement notes that Governor H has supported the death penalty in the past. The advertisement identifies several individuals previously executed in State Z, stating that Governor H could have saved their lives by stopping their executions. No executions are scheduled in State Z in the near future. The advertisement concludes with the statement "Call or write Governor H to demand a moratorium on the death penalty in State Z." Under the facts and circumstances in Situation 6, the advertisement is for an exempt function under §527(e)(2). T's advertisement identifies Governor H, appears shortly before an election in which Governor H is a candidate, targets the voters in that election, and identifies Governor H's position as contrary to T's position. The advertisement is not part of an ongoing series of substantially similar advocacy communications by T on the same issue. In addition, the advertisement does not identify and is not timed to coincide with a specific event outside the control of the organization

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REGULATORY PROVISIONS ON CONTRIBUTIONS, EXPENDITURES, AND ELECTIONEERING		
		that it hopes to influence. Based on these facts and circumstances, the amount expended by T on the advertisement is an exempt function expenditure under §527(e)(2) and is subject to tax under §527(f)(1). 2004-4 I.R.B. 328, 332. 37. The example for the Section 501(c)(5) labor organization is as follows: Situation 1. N, a labor organization recognized as tax-exempt under §501(c)(5), advocates for the betterment of conditions of law enforcement personnel. Senator A and Senator B represent State U in the United States Senate. In year 200x, N prepares and finances full-page newspaper advertisements supporting increased spending on law enforcement, which would require a legislative appropriation. These advertisements are published in several large circulation newspapers in State U on a regular basis during year 200x. One of these full-page advertisements is published shortly before an election in which Senator A (but not Senator B) is a candidate for re-election. The advertisement published shortly before the election stresses the importance of increased federal funding of local law enforcement and refers to numerous statistics indicating the high crime rate in State U. The advertisement does not mention Senator A's or Senator B's position on law enforcement issues. The advertisement ends with the statement "Call or write Senator A and Senator B to ask them to support increased federal funding for local law enforcement." Law enforcement has

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		not been raised as an issue distinguishing Senator A from any opponent. At the time this advertisement is published, no legislative vote or other major legislative activity is scheduled in the United States Senate on increased federal funding for local law enforcement. Under the facts and circumstances in Situation 1, the advertisement is not for an exempt function under §527(e)(2). Although N's advertisement identifies Senator A, appears shortly before an election in which Senator A is a candidate, and targets voters in that election, it is part of an ongoing series of substantially similar advocacy communications by N on the same issue during year 200x. The advertisement identifies both Senator A and Senator B, who is not a candidate for re-election, as the representatives who would vote on this issue. Furthermore, N's advertisement does not identify Senator A's position on the issue, and law enforcement has not been raised as an issue distinguishing Senator A from any opponent. Therefore, there is nothing to indicate that Senator A's candidacy should be supported or opposed based on this issue. Based on these facts and circumstances, the amount expended by N on the advertisement is not an exempt function expenditure under §527(e)(2) and is not subject to tax under §527(f)(1). 2004-4 I.R.B. 328, 330-31. 38. The example for the Section 501(c)(6) trade association is as follows:

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		Situation 2. O, a trade association recognized as tax-exempt under §501(c)(6), advocates for increased international trade. Senator C represents State V in the United States Senate. O prepares and finances a full-page newspaper advertisement that is published in several large circulation newspapers in State V shortly before an election in which Senator C is a candidate for nomination in a party primary. The advertisement states that increased international trade is important to a major industry in State V. The advertisement states that S. 24, a pending bill in the United States Senate, would provide manufacturing subsidies to certain industries to encourage export of their products. The advertisement also states that several manufacturers in State V would benefit from the subsidies, but Senator C has opposed similar measures supporting increased international trade in the past. The advertisement ends with the statement "Call or write Senator C to tell him to vote for S. 24." International trade concerns have not been raised as an issue distinguishing Senator C from any opponent. S. 24 is scheduled for a vote in the United States Senate before the election, soon after the date that the advertisement is published in the newspapers. Under the facts and circumstances in Situation 2, the advertisement is not for an exempt function under §527(e)(2). O's advertisement identifies Senator C, appears shortly before an election in which Senator C is a candidate, and targets voters in that election. Although international trade issues have not been raised as an issue distinguishing Senator C from any opponent, the advertisement identifies Senator

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		C's position on the issue as contrary to O's position. However, the advertisement specifically identifies the legislation O is supporting and appears immediately before the United States Senate is scheduled to vote on that particular legislation. The candidate identified, Senator C, is a government official who is in a position to take action on the public policy issue in connection with the specific event. Based on these facts and circumstances, the amount expended by O on the advertisement is not an exempt function expenditure under §527(e)(2) and is not subject to tax under §527(f)(1). 2004-4 I.R.B. 328, 331. The IRS used a similar example in IRS Fact Sheet 2006-17, Example 14 (Feb. 2006), and Rev. Rul. 2007-41, Situation 14, 2007-25 I.R.B. 1421, 1424-25 (June 18, 2007), which concludes that the organization has not engaged in campaign intervention. The IRS also pointed out that the advertisement does not mention the election or the candidacy of Senator C. PROHIBITION AGAINST PRIVATE BENEFIT 39. (a) A Section 501(c)(3) organization's campaign activities, even when they are educational, nonpartisan, and do not violate the prohibition against campaign intervention, can violate the prohibition against private benefit. Treas. Reg. §1.501(c)(3)-1(d)(1)(ii); American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989) (Section 501(c)(3) organization impermissibly benefited the Republican party through training school for campaign workers, a function

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		previously conducted by the National Republican Congressional Committee; Section 501(c)(3) organization cannot confer a substantial benefit on particular political interests). (b) The requirement under Treas. Reg. §1.501(c)(4)-1(a)(2)(i) that a Section 501(c)(4) organization promote the common good and general welfare of the community means that the prohibition against private benefit applied in American Campaign Academy also applies to Section 501(c)(4) organizations. The prohibition on private benefit is a logical extension of the requirement that a Section 501(c)(4) organization must promote the common good and general welfare of the people of the community. See Treas. Reg. §1.501(c)(4)-2(i); Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d 684 (2d Cir. 1973); Erie Endowment v. United States, 316 F.2d 151 (3d Cir. 1963) (Section 501(c)(4) organization "must be a community movement designed to accomplish community ends"); PLR 201403020 (organization operated primarily for the benefit of private interests and not to promote social welfare when it spent 90% percent of its time and resources promoting participation in a political party, endorsing candidates of that party, and promoting the active pursuit of a particular voting demographic by that party); PLR 201221029 (organization that primarily served private interests did not operate exclusively for the promotion of social welfare under Section 501(c)(4); under Articles of Incorporation and Bylaws, organization's primary activity

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		was to conduct training programs for women who were members of one political party to run for political office; organization measured its success by the number of graduates who ran for, or won, elective political office representing the party); PLR 201221028 (same); PLR 201221027 (same); PLR 201221026 (same); PLR 201221025 (same); PLR 201214035 (organization did not serve social welfare purposes under Code Section 501(c)(4) when it conducted its activities with the partisan objective of benefiting the interests of M, a presidential candidate in foreign country P; the purpose of advertising in periodicals and the sale of books was to attract citizens of P's attention to the politics in P and to create a high turnout of voters, thus supporting homeland prosperity and advanced politics through M, and to further the development of rights and interests of citizens of P in the United States for the next generation); PLR 201128035 ("[F]or purposes of both section 501(c)(3) and section 501(c)(4), an organization which conducts its educational activities to benefit a political party and its candidates serves private interests;" under Articles of Incorporation and Bylaws, Section 501(c)(4) organization's primary activity is to train and recruit persons affiliated with a certain political party to run for political office; organization measured its success by the number of graduates who have won elective office representing the party, or are actively engaged as campaign managers and advocates for campaigns of candidates affiliated with the party); PLR 201128034 (same); PLR 201128032 (same); PLR 20044008E ("The private benefit standard as described in American Campaign

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		Academy also applies to organizations seeking exemption under 501(c)(4). The difference between these two Code Sections [Section 501(c)(3) and Section 501(c)(4)] lies in the weight accorded the private benefits (i.e. the amount of private benefits), not the standard. See, e.g., Rev. Rul. 75-286 [1975-2 C.B. 210];" organization conducted political leadership training program with the goal of increasing the number of women involved in public service, including elected office and appointive governmental positions; organization denied exemption under Code Section 501(c)(4) because it was created for the partisan objective of training and supporting politicians affiliated with a particular faction in the political spectrum). See also Jonathan D. Salant, "IRS Denial of Tax Exemption To U.S. Political Group Spurs Alarms," Bloomberg.com (June 8, 2012) ("While the nonprofit wasn't named [in PLRs 201221028, 201221027, 201221026, and 201221025], it was Emerge America, its president, Karen Middleton, told Bloomberg News. The national organization is based in San Francisco and works with nine state affiliates that train Democratic women candidates.") (available at www.bloomberg.com/news/2012-06-08/irs-denial-of-tax-exemption-to-u-s-political-group-spurs-alarms.html); Stephanie Strom, "3 Groups Denied Break by I.R.S. Are Named," NYTimes.com (July 20, 2011) ("Three nonprofit advocacy groups that were denied tax exemption by the Internal Revenue Service [in PLRs 201128035, 201128034; 201128032] were all units of Emerge America, an organization devoted to cultivating female political leaders for local, state and federal

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		government. The I.R.S. denied tax exemption to the groups– Emerge Nevada, Emerge Maine and Emerge Massachusetts– because, the agency wrote in denial letters, they were set up specifically to cultivate Democratic candidates. Their Web sites ask for evidence that participants in their training programs are Democrats.") (available at www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=1&scp=1&sq=emerge%20nevada&st=cse). (c) In PLR 201224034, the IRS denied an organization Section 501(c)(4) status because of private benefit. The organization was formed to promote solutions through grassroots advocacy and publicity regarding marine environmental issues, investment in sewer systems, law enforcement raids, school programs, job development, and ambulance response rates. The organization also conducted activities in connection with the founder's election as chair of County state-mandated organization whose mission is to represent the interests of parents and citizens to county's board of education. The founder was the sole director, and the president, secretary, and treasurer. The founder was also the primary funder. The organization's activities were suspended during the founder's election campaign. The founder maintained a blog in which five of seventeen entries criticized the founder's former opponent in a race for elected office, and that contained links to the founder's campaign Website. The critical blog posts occurred both before and after the election. The blog also contained information on the

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		political agendas of elected officials. The IRS, citing Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d 684 (2d Cir. 1973), and Erie Endowment v. United States, 316 F.2d 151 (3d Cir. 1963), ruled that the organization's programs solely served to promote the founder. Furthermore, the organization lacked community input or oversight, and any independent members of the community on its board of directors. Finally, the organization did not establish that its primary activity was not to engage in political intervention. (d) "Private benefit to partisan interests thus appears to be a theoretically viable basis to exclude certain non-campaign §501(c)(4) activities from the purview of social welfare. However, its application presents significant practical difficulties. In all but the most extreme cases, an organization that is not merely the arm of a political party will be able to point to differences with partisan entities sufficient to undermine a partisan benefit challenge. As the recent application for §501(c)(4) status by Empower America shows, while conservative interests may have significant overlap with policies and priorities of the Republican party, that overlap alone is not sufficient to find that promoting a conservative agenda confers impermissible private benefit on partisan Republican interests. Similarly, the Service concluded that the Progress and Freedom Foundation ("PFF"),[33] associated with a course taught by Congressman Newt Gingrich, qualified as a § 501(c)(3) organization even though individuals involved with PFF intended to use themes

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		and ideas developed in the course for partisan purposes.[34] [33] The TAM was unpublished, but its full text was made available by the organization. Tech. Adv. Mem. (Dec. 1, 1998), available in Tax Analysts Doc. No. 1999-5081 or 1999 TNT 24-25. [34] Another §501(c)(3) organization involved in related activities, the Abraham Lincoln Opportunity Foundation ("ALOF"), lost its exemption on the basis of operating for the private benefit of partisan Republican interests. Because ALOF had already been dissolved at the time, it lacked standing to challenge the revocation so the use of the theory in that case was not further tested. Abraham Lincoln Opportunity Found. v. Commissioner, No. 4436-99X (11th Cir. 2001), available in Tax Analysts Doc. No. 2001-17798. Its exemption was restored in early 2003, after a special review of the file conducted by the IRS. I.R.S. Announcement 2003-30, 2003-1 C.B. 929. Notably, however, the IRS original revocation letter asserted that ALOF received substantial funding via loans from GOPAC, a political organization, and that it was active in GOPAC's efforts to train Republican political activists, so that it was operated for the private benefit of GOPAC. These facts, if correct, could distinguish this case from PFF. The public record does not indicate whether the IRS determined that these facts did not in fact indicate that ALOF operated for partisan purposes, or if there was some other basis for the Service's reversal. The PFF TAM distinguished American

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		Campaign Academy on several grounds: the PFF course was not a direct outgrowth of an official party organization's activities; its funding sources were not partisan; there was no evidence of political bias in admission of students because the course was offered through established colleges; and the material in the course was not explicitly biased towards a party." American Bar Association, Section of Taxation, Exempt Organizations Committee, Subcommittee on Political and Lobbying Organizations and Activities, Final Report of Task Force on Section 501(c)(4) and Politics, May 7, 2004, at 21-22 (available at http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf). INSUBSTANTIALITY LIMITATION ON LOBBYING BY PUBLIC CHARITIES 40. (a) Code Section 501(c)(3) defines a Section 501(c)(3) organization as one "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as provided in subsection (h))." (b) A public charity that engages in substantial lobbying activity becomes an "action organization" that does not qualify for tax-exemption under Section 501(c)(3). A public charity becomes an action organization when: (i) a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. An organization attempts to influence legislation when it contacts, or urges the public to contact, members of a legislative body for the purpose of

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		proposing, supporting, or opposing legislation, or advocates the adoption or rejection of legislation; or (ii) the organization's primary objective or objectives may be attained only by legislation or the defeat of proposed legislation (e.g., an organization formed specifically to promote a constitutional amendment prohibiting abortion or same-sex marriage), and the organization advocates or campaigns for the attainment of that objective or objectives rather than engaging in nonpartisan analysis or research and making the results available to the public. Treas. Reg. §1.501(c)(3)-1(c)(3)(ii) and (iv); see also Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) (contacting legislators or their staff to persuade the legislators to vote a certain way is lobbying), cert. denied, 419 U.S. 1107 (1975); Rev. Rul 67-293, 1967-2 C.B. 185 (since lobbying activities were substantial, organization did not qualify for Section 501(c)(3) status; organization operated animal shelters and encouraged others to contact legislators to support legislation to protect animals' well-being). (c) Under the Code and regulations, there are two issues: (i) whether the activity constitutes lobbying; and (ii) if yes, whether lobbying is a substantial part of the organization's activities. (d) Legislation means action by Congress, state legislatures, local governing bodies, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. It also includes action by the Senate to ratify a treaty, or

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		confirm a Supreme Court or other federal court nominee, or to confirm a person to a position in an administrative agency. Treas. Reg. §1.501(c)(3)-1(c)(3)(ii); see also IRS Notice 88-76, 1988-27 I.R.B. 34 (attempting to influence the Senate confirmation of a person nominated by the President to be a federal judge is lobbying). (e) Legislation does not include action by the executive branch or administrative agencies with respect to regulatory matters. A public charity can engage in unlimited advocacy regarding regulatory action to be taken by an administrative agency. However, when a public charity seeks to influence an administrative agency's position on legislation, it engages in lobbying. (f) Legislation does not include litigation activities within the judicial branch when the organization seeks to fulfill its charitable purposes through the institution of litigation as plaintiff. (g) Lobbying can be direct lobbying, or grassroots lobbying. This distinction is especially important for organizations that make an election under Sections 501(h) and 4911. (h) The United States Supreme Court has upheld the Section 501(c)(3) insubstantiality limitation on lobbying against First Amendment and equal protection attack. In Regan v. Taxation With Representation, 461 U.S. 540, 548-51 (1983), the Court held that "tax exemptions and tax deductibility are a form of [federal] subsidy," and "Congress is not required by

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		the First Amendment to subsidize lobbying." 461 U.S. at 544, 546. In an important concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, wrote that although the First Amendment does not require the government to subsidize lobbying through a tax deduction, conditioning the deduction on a complete prohibition on lobbying would be unconstitutional since it would deny "a significant benefit to organizations choosing to exercise their constitutional rights." 461 U.S. at 552. This concern was addressed by the ability of a Section 501(c)(3) organization to use an affiliated, yet separate, Section 501(c)(4) organization to engage in lobbying. The requirement of separate organizations ensures that the Section 501(c)(3) organization does not subsidize the Section 501(c)(4) organization; otherwise, public funds would be spent on an activity Congress chose not to subsidize. See also Agency for International Development v. Alliance for Open Society International, 133 S. Ct. 2321, 2328-29 (2013) (denial of a tax deduction for lobbying expenses is a permissible Congressional decision not to subsidize lobbying, and does not impose an unconstitutional burden on protected First Amendment activity); Cammarano v. United States, 358 U.S. 498, 513 (1959) (Treasury regulation that denied a deduction for ordinary and necessary business expenses for the cost of ads for a ballot measure did not violate the First Amendment; "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in such

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		activities is required to do;" "[I]t appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."); Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) (court upheld insubstantiality limitation on lobbying against First Amendment attack), cert. denied, 414 U.S. 864 (1973). Cf. Autor v. Pritzker, 740 F.3d 176 (D.C. Cir. 2014) (lobbyists who challenged presidential executive order making registered lobbyists ineligible to serve on federal Industry Trade Advisory Committees stated a viable First Amendment unconstitutional conditions claim; ban pressured lobbyists to limit their constitutional right to petition the government). (i) The requirements for the separation between the Section 501(c)(3) organization and the Section 501(c)(4) organization are: (i) the organizations must be separately organized under applicable state law; (ii) the organizations must keep separate books and records sufficient to show that tax-deductible contributions to the Section 501(c)(3) organization are not used to pay for lobbying; (iii) the organizations must keep separate bank accounts; (iv) if the organizations have common directors, officers, or employees, the organizations must track their time and allocate the time worked to the organization for which services were performed; (v) the organizations must reasonably allocate shared property and

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		services; and (vi) the organizations must conduct all business between each other on arm's length terms. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 552-53 (1983) (Blackmun, J., concurring); Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) (each corporation is a separate taxable entity for federal income tax purposes if the corporation is formed for valid business purposes, and is not a sham, an agency, or instrumentality); Ward I. Thomas & Judith Kindell, Affiliations Among Political, Lobbying, and Educational Organizations (2000) (available at www.irs.gov/pub/irs0-tege/eotopics00.pdf). EXCEPTIONS TO LOBBYING UNDER SECTION 4945 41. (a) Private foundations are prohibited from engaging in lobbying. I.R.C. §4945(d)(1). The private foundation regulations contain exceptions to the definition of lobbying, and most counsel take the position that the exceptions also apply to public charities. (b) A communication is not a lobbying communication if it is nonpartisan analysis, study, or research, and the results are made available to the general public or a segment or members thereof, or to governmental bodies, officials, or employees. Nonpartisan analysis, study, or research means an independent and objective exposition of a particular subject matter. It may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an

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		individual to form an independent opinion or conclusion. A work may fail to come within this exception if it is distributed only to those interested in one side of the issue. Treas. Reg. §53.4945-2(d)(1). (c) Examinations and discussions of broad social, economic, and similar problems are not lobbying even if the problems are of the type with which government would be expected ultimately to deal with. Lobbying communications do not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as the discussion does not address itself to the merits of a specific legislative proposal, and so long as such discussion does not directly encourage recipients to take action with respect to legislation. Treas. Reg. §53.4945-2(d)(4). (d) Lobbying communications do not include the provision of technical advice or assistance to a governmental body, a governmental committee, or a subdivision of either of the foregoing, in response to a written request by the body, committee, or subdivision. The request for assistance or advice must be made in the name of the requesting governmental body, committee, or subdivision, rather than an individual member thereof. Similarly, the response to the request must be available to every member of the requesting body, committee, or subdivision. Because the assistance or advice may be given only upon an express request, the oral or

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		written presentation of the assistance or advice need not qualify as nonpartisan analysis, study, or research. The offering of opinions or recommendations will ordinarily qualify under this exception only if they are specifically requested by the governmental body, committee, or subdivision, or are directly related to the materials so requested. Treas. Reg. §53.4945-2(d)(2); see also Rev. Rul. 70-449, 1970-2 C.B. 112 (university that operated a nationally prominent biology research department did not engage in lobbying when, at the request of a legislative committee, a representative testified as an expert witness on pending legislation affecting the university); Rev. Rul. 64-195, 1964-2 C.B. 138 (organization that studied the law and court systems to assist lawyers in their continuing legal education did not engage in lobbying when it conducted nonpartisan study, research, and assembly of materials with respect to court reform, and disseminated its findings to the public). (e) Lobbying communications do not include an appearance before, or communication with, any legislative body with respect to a possible decision by that body that might affect the private foundation's existence, its powers and duties, its tax-exempt status, or the deductibility of contributions to it. A foundation may communicate with the entire legislative body, its committees or subcommittees, individual congressmen or legislators, members of their staffs, or executive branch representatives who are involved in the legislative process, if the communication is limited to the

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		prescribed subjects. Similarly, the foundation may make expenditures to initiate legislation if the legislation concerns only matters that might affect the private foundation's existence, its powers and duties, its tax-exempt status, or the deductibility of contributions to it. Treas. Reg. §53.4945-2(d)(3). DETERMINATION OF INSUBSTANTIALITY 42. (a) The insubstantiality limitation on lobbying is a facts and circumstances test. The courts have developed three tests for determining insubstantiality: (i) the time and percentage test; (ii) the expenditure percentage test; and (iii) the balancing of activities test. (b) In Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955), the court adopted the time and effort percentage test. The court held that when an organization devoted less than five percent of its time and effort to lobbying, the lobbying was not substantial in relation to the organization's other activities. The court did not explain how to determine the percentage of time and effort. The organization in Seasongood engaged in activities to promote Cincinnati's sanitation efforts and school systems. See also League of Women Voters v. United States, 180 F. Supp. 379 (Ct. Cl. 1960) (since organization engaged in substantial lobbying activities, it was ineligible for the estate tax exemption for charitable organizations; court looked to the time that the organization spent on lobbying activities to determine

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		whether the activities were substantial; in calculating time spent, court considered the time spent studying, discussing, and formulating a position on the issues, as well as the time spent contacting government officials), cert. denied, 364 U.S. 822 (1960). (c) In Haswell v. Commissioner, 500 F.2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975), the court used the expenditure percentage test to determine whether the National Association of Railroad Passengers' lobbying activities were substantial. The court held that insubstantiality is determined by comparing the amount of the organization's expenditures allocated to lobbying to its total expenditures. When lobbying expenditures ranged from 16.6 to 20.5 percent of the organization's annual budget over two years, and the organization had a primary objective that was political in nature, the organization's lobbying activities were substantial. Finally, the court acknowledged that expenditures were only one measure of insubstantiality. (d) In Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973), the court rejected the use of the percentage and expenditure tests, and adopted the balancing of activities test. The court held, "The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its activities was to influence or attempt to influence legislation. A percentage test to determine whether

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		the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances." (citations omitted). The court must not only consider the time and expenditures that an organization devotes to lobbying, but also facility and property use, the amount of information disseminated, and the organization's reputation in the community. The court found it important that the organization published numerous articles and delivered frequent radio broadcasts on over twenty issues that were widely disseminated in an effort to mold public opinion. In addition, the organization called for action with the slogan, "Your opinion isn't worth a nickel without your action to back it up." 470 F.2d at 855. In light of these activities, the court held that the lobbying activities were substantial without regard to a percentage or expenditure test. See also G.C.M. 36,148 (Jan. 28, 1975) ("[T]he percentage of the budget dedicated to a given activity is only one type of evidence of substantiality. Others are the amount of volunteer time devoted to the activity, the amount of the publicity the organization assigns to the activity, and the continuous or intermittent nature of the organization's attention to it. All such factors have a bearing on the relative importance of activity, and should be given due consideration in determining whether its conduct is reconcilable with the requirement that it operate exclusively for exempt purposes."); IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 6 (Nov. 2013) ("Whether a church's or religious organization's attempts to influence legislation constitute a substantial part of its overall activities

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		is determined on the basis of all the pertinent facts and circumstances in each case. The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial."). (e) A Section 501(c)(3) organization that engages in substantial lobbying loses its tax-exemption. In addition, the organization must pay an excise tax equal to five percent of the lobbying expenditures. I.R.C. §4912(a). Lobbying expenditures mean "any amount paid or incurred by the organization in carrying on propaganda, or otherwise attempting to influence legislation." I.R.C. §4912(d)(1). Under this definition, lobbying expenditures include the value of services performed by the organization's employees who engaged in research, preparation, and lobbying activities. (f) The excise tax on the organization does not apply to: (i) an organization that made an election under Sections 501(h) and 4911; (ii) an organization that is ineligible to make an election under Sections 501(h) and 4911; and (iii) a private foundation. I.R.C. §4912(c). (g) When the excise tax is imposed on the organization, a five percent excise tax is also imposed on the agreement of any organization manager to the making of lobbying expenditures, knowing that the expenditures are likely to

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		result in the organization not being described in Section 501(c)(3), unless the agreement is not willful and is due to reasonable cause. The tax is imposed on any manager who agreed to the making of the expenditures. I.R.C. §4912(b). If more than one manager is liable for the excise tax, all the managers are jointly and severally liable for the tax. I.R.C. §4912(d)(3). (h) An organization manager is any officer, director, or trustee of the organization (or anyone with authority similar to these positions), and any employee with authority or responsibility of the expenditure in question. I.R.C. §§4912(d)(2) and 4955(f)(2). (i) A charitable contribution deduction is disallowed for contributions to a Section 501(c)(3) organization that violates the insubstantiality limitation on lobbying. Treas. Reg. §1.170A-1(j)(5). See Paragraph 14 of the I.R.C. column for "Consequences of Violations" for a discussion of a taxpayer's entitlement to the charitable contribution deduction for contributions made before the date of a public announcement by the IRS of the organization's loss of tax-exemption. SAFE HARBOR ELECTION UNDER SECTIONS 501(h) AND 4911 43. (a) One way to deal with the uncertainty of the facts and circumstances test is for a public charity to elect the safe harbor lobbying rules of Code Sections 501(h) and 4911.

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		The following Section 501(c)(3) organizations cannot make this election: (i) churches and conventions or associations of churches; (ii) an integrated auxiliary of a church or a convention or association of churches; (iii) a member of an affiliated group of organizations under Code Section 4911(f)(2) if one or more members is described in clauses (i) or (ii); and (iv) private foundations. I.R.C. §501(h)(3)-(5). In addition, these organizations are not subject to the excise tax on substantial lobbying expenditures. I.R.C. §4912(h)(3)-(5). See also Judith E. Kindell and John Francis Reilly, "Lobbying Issues," IRS FY 1997 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, at 286 (the "1997 CPE Text") ("Churches, along with church-related organizations, were precluded from making an election under IRC 501(h) at their own request. The Joint Committee on Taxation, in its General Explanation of the Tax Reform Act of 1976, 1976-3 C.B. (Vol. 2) 415-416, notes that church groups expressed concern that any restriction on their lobbying activities might violate their rights under the First Amendment. More particularly, the church groups were concerned that including them among the class of organizations eligible to elect might imply Congressional ratification of the decision in Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973), which held that the limitations on lobbying were constitutionally valid and that First Amendment rights in the face of such limitations were not absolute. By disqualifying churches and church-related organizations from making the election,

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		Congress sought to remain neutral on the constitutional issue; in fact the Joint Committee on Taxation's Explanation explicitly states: 'So that unwarranted inferences may not be drawn from the enactment of this Act, the Congress states that its actions are not to be regarded in any way as an approval or disapproval of the decision [in Christian Echoes], or of the reasoning in any of the opinions leading to that decision.' Id. at 420."). (b) Under Sections 501(h) and 4911, the total amount of permissible lobbying expenditures is based on a percentage of the public charity's annual exempt purpose expenditures. Exempt purpose expenditures are expenditures that are not subject to the tax on unrelated business taxable income, and include lobbying for exempt purposes. Exempt purpose expenditures do not include capital and fundraising expenditures. I.R.C. §4911(c)(1) and (e)(1)(A). (c) Lobbying expenditures are amounts spent on direct lobbying and grassroots lobbying. See discussion of the definition of direct lobbying in Paragraph 48, and the definition of grassroots lobbying in Paragraphs 49 to 50. Lobbying activities that do not entail expenditures, such as unreimbursed lobbying activities by bona fide volunteers, are not included in lobbying expenditures. In addition, expenditures for activities that are exceptions to the definition of lobbying are not taken into account. See discussion of the exceptions in Paragraphs 51 to 52.

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		(d) When a public charity makes a grant that is earmarked for lobbying, the public charity makes a lobbying expenditure. Treas. Reg. §§56.4911-4(f)(4) and 53.4945-2(a)(6). A private letter ruling, PLR 200943042, provides guidance for public charities to determine when grants are not earmarked for lobbying and therefore are not lobbying expenditures. (e) Under PLR 200943042, a public charity may treat general support grants to a public charity as nonlobbying expenditures as long as the grant is not earmarked for lobbying. A public charity's grant restricted for use for a specific project is not, solely due to this restriction, earmarked for lobbying. A public charity's grant may treat a project grant as not earmarked for lobbying if the grant amount, combined with its other grants for that project during the year, do not exceed the nonlobbying portion of the project's budget, and the public charity does not doubt, or have reason to doubt, the budget information provided by the grantee. If a project grant exceeds the nonlobbying portion of the project budget, the public charity must treat as a lobbying expenditure the amount by which the grant exceeds the nonlobbying amount. (f) Expenditures for grassroots lobbying cannot exceed 25% of total lobbying expenditures. (g) The regulations provide rules for determining the costs that constitute lobbying expenditures, Treas. Reg. §56.4911-3(a)(1), the allocation of expenditures for a communication

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		that has both lobbying and bona fide nonlobbying purposes between the two purposes, Treas. Reg. §56.4911-3(a)(2), the allocation of expenditures for a communication that is both a direct lobbying communication and a grassroots lobbying communication between the two types of lobbying, Treas. Reg. §56.4911-3(a)(3), and determining the amount of exempt purpose expenditures, Treas. Reg. §56.4911-4. (h) Total lobbying expenditures, or the lobbying nontaxable amount, are as follows: (i) for exempt purpose expenditures of up to $500,000, the total lobbying nontaxable amount is 20% of exempt purpose expenditures, and the grassroots nontaxable amount is 25% of the total lobbying nontaxable amount; (ii) for exempt purpose expenditures of over $500,000 to $1 million, the total lobbying nontaxable amount is $100,000 plus 15% of the excess over $500,000 in exempt purpose expenditures, and the grassroots nontaxable amount is $25,000 plus 3.75% of the excess over $500,000 in exempt purpose expenditures; (iii) for exempt purpose expenditures of over $1 million to $1.5 million, the total lobbying nontaxable amount is $175,000 plus 10% of the excess over $1 million in exempt purpose expenditures, and the grassroots nontaxable amount is $43,750 plus 2.5% of the excess over $1 million in exempt purpose expenditures; (iv) for exempt purpose expenditures of over $1.5 million to $17 million, the total lobbying nontaxable amount is $225,000 plus 5% of the excess over $1.5 million in exempt purpose expenditures, and the grassroots nontaxable amount is $56,250 plus 1.25% of the excess over $1.5 million in exempt

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		purpose expenditures; and (v) for exempt purpose expenditures of over $17 million, the total lobbying nontaxable amount is $1 million, and the grassroots nontaxable amount is $250,000. 44. (a) The Code imposes a 25% excise tax on lobbying expenditures that exceed either the total lobbying expenditure limit, or the grassroots lobbying expenditure limit. I.R.C. §4911(a)(1). If both limits are exceeded, the tax is imposed on the higher excess amount. Treas. Reg. §56.4911-1(b). (b) If the organization normally spends more than 150% of its Section 501(h) limit on lobbying, the IRS may revoke the organization's tax-exempt status. The Code does not define "normally." The regulations use the three preceding years and the current year (the "base years") as the test for the loss of tax-exemption. If during the base years the cumulative lobbying expenditures do not exceed 150% of the cumulative lobbying nontaxable amount, and the cumulative grassroots lobbying expenditures do not exceed 150% of the cumulative grassroots nontaxable amount, the organization will retain its tax-exempt status. Treas. Reg. §1.501(h)-3(b)(1). (c) The regulations provide rules for the treatment of affiliated organizations in determining the amount of lobbying expenditures and the imposition of the excise tax. I.R.C. §4911(f); Treas. Reg. §§56.4911-7(a)(1), 56.4911-8(d), and 56.4911-9(d)(4)(ii). 45. One commentator provides the following five-step approach

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		for determining compliance with the safe harbor election under Sections 501(h) and 4911: (a) Step One: Determine the exempt purpose expenditures for the year. (b) Step Two: Calculate the maximum permissible lobbying nontaxable amount. (c) Step Three: Determine which activities are direct lobbying, and which activities are grassroots lobbying. (d) Step Four: Calculate the grassroots lobbying amount. (e) Step Five: Compute the tax on excess lobbying expenditures. Daniel C. Willingham, "'Are You Ready for Some (Political) Football?' How Section 501(c)(3) Organizations Get Their Playing Time During Campaign Seasons," 28 Akron Tax Journal 83, 104-108 (2013). 46. This commentator provides the following example of the five-step approach: Alpha, Beta, and Chi are all Section 501(c)(3) organizations. They have satisfied all requirements and formalities to maintain their Section 501(c)(3) status, and they are identical in all aspects unless otherwise noted below.

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Organization	Status	Step 1	Step 2	Step 3	Step 4	Step 5
Alpha	Pass	$1,200,000	$195,000	GLE: $20,000 CLE: $175,000	$20,000	$0
Beta	Fail	$1,200,000	$195,000	GLE: $30,000 CLE: $175,000	$30,000	.25 x $10,000 = $2,500
Chi	Fail	$1,200,000	$195,000	GLE: $95,000 CLE $100,000	$95,000	.25 x $70,000 = $17,500

Note:
Grassroots lobbying expenditures = GLE
Combined lobbying expenditures = CLE

Alpha followed the statute and therefore incurred no tax. As a result, Alpha's tax-exempt status has been fully protected.

Beta had grassroots lobbying expenditures at less than or equal to combined lobbying expenditures, but had combined lobbying expenditures $10,000 in excess of the allowed amount. As a result, Beta owes $2,500 in tax.

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		Chi had combined lobbying expenditures equal to the maximum amount, but had grassroots lobbying expenditures that were $70,000 in excess of the allowed amount. As a result, Chi owes $17,500 in tax. [Daniel C. Willingham, "'Are You Ready for Some (Political) Football?' How Section 501(c)(3) Organizations Get Their Playing Time During Campaign Seasons," 28 Akron Tax Journal 83, 122 (2013)] 47. The benefits of the election under Sections 501(h) and 4911 are as follows. The definitions of direct lobbying and grassroots lobbying, and the limitations on the expenditures for each type of lobbying, provide certainty. The election also benefits small organizations that are less likely to come up against the expenditure limitations. It also benefits organizations that use substantial numbers of volunteers. The disadvantage of the election is the $1 million cap. The cap is especially hard on large organizations that can spend over $1 million on lobbying, and still come within ten percent of expenditures under the insubstantiality test. DEFINITION OF DIRECT LOBBYING UNDER SECTION 4911 48. (a) Direct lobbying is any attempt to influence legislation through communication with any member or employee of a legislative body, or with any government official or employee who participates in the formulation of the legislation, when the principal purpose of the communication is to influence legislation. A government official includes an official of an

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		administrative agency who has responsibility for legislative matters. Treas. Reg. §56.4911-2(b)(1)(i). A communication with a legislator or government official is treated as direct lobbying only if the communication refers to specific legislation, and reflects a view on such legislation. Treas. Reg. §56.4911-2(b)(1)(ii)-(iii). Therefore, communications with members or employees of legislative bodies to obtain information on the status of legislative proposals without any purpose to influence legislation are not direct lobbying. (b) Specific legislation means legislation that has already been introduced in a legislative body, or a specific legislative proposal that the organization either supports or opposes. In the case of a referendum, ballot initiative, constitutional amendment, or other measure that is placed on the ballot by petitions signed by a required number or percentage of voters, the voters are considered legislators. An item becomes specific legislation when the petition is first circulated among voters for signature. Treas. Reg. §56.4911-2(d)(1)(ii). (c) Legislative bodies do not include executive, judicial, and administrative bodies. Treas. Reg. §56.4911-2(d)(3). Administrative bodies are housing authorities, school boards, sewer and water districts, zoning boards, and other similar federal, state, and local special purpose bodies, whether elective or appointive. Treas. Reg. §56.4911-2(d)(4). (d) The exceptions to direct lobbying are discussed in

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		Paragraph 41 above. DEFINITION OF GRASSROOTS LOBBYING UNDER SECTION 4911 49. (a) Grassroots lobbying is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment of the general public. Treas. Reg. §56.4911-2(b)(2)(i). A communication will be treated as grassroots lobbying only if the communication refers to specific legislation, reflects a view on specific legislation, and encourages the recipient to take action with respect to the specific legislation. Treas. Reg. §56.4911-2(b)(2)(ii). This last element is known as a "call to action." (b) A communication is a call to action if it: (i) states that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation); (ii) states the address, telephone number, or similar information of a legislator or an employee of a legislative body; or (iii) provides a petition, tear-off postcard or similar material for the recipient to communicate with a legislator or an

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		employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of so facilitating contact with the government official or employee is to influence legislation); or (iv) specifically identifies one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation. Encouraging the recipient to take action does not include naming the main sponsor(s) of the legislation for purposes of identifying the legislation. Treas. Reg. §56.4911-2(b)(2)(iii). (c) The first three types of calls to action are direct encouragement, and the fourth type is indirect encouragement. Treas. Reg. §56.4911-2(b)(2)(iii)-(iv). This distinction is important in determining with the nonpartisan analysis exception to grassroots lobbying is satisfied. (d) A call to action is not required for paid advertisements placed in the mass media, which are presumed to be a grassroots lobbying communication, if the advertisement: (i) appears in the mass media within two weeks before a vote by a legislative body or a committee thereof (but not a subcommittee) on highly publicized legislation; (ii) reflects a view on the general subject of the legislation; and (iii) either

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		refers to the legislation or encourages the public to communicate with legislators about the legislation. Treas. Reg. §56.4911-2(b)(5)(ii). The organization can rebut this presumption by showing that the advertisement is a type of communication regularly made by the organization in the mass media without regard to the timing of the legislation or that the timing of the advertisement was unrelated to the legislative action. Id. (e) "Mass media" means television, radio, billboards, and general circulation newspapers and magazines. General circulation newspapers and magazines do not include newspapers and magazines published by an organization for which the expenditure test election under Section 501(h) is in effect, except when the total circulation of the newspaper or magazine is greater than 100,000, and fewer than one-half of the recipients are members of the organization as defined in Treas. Reg. §56.4911-5(f). Treas. Reg. §56.4911-2(b)(5)(iii)(A). (f) When an electing public charity is itself a mass media publisher or broadcaster, all portions of that organization's mass media publications or broadcasts are treated as paid advertisements in the mass media, except those specific portions that are advertisements paid for by another person. Treas. Reg. §56.4911-2(b)(5)(iii)(B). (g) "Highly publicized" means frequent coverage on television and radio, and in general circulation newspapers,

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		during the two weeks preceding the vote by the legislative body or committee. In the case of state or local legislation, "highly publicized" means frequent coverage in the mass media that serve the state or local jurisdiction in question. Even when legislation receives frequent coverage, it is highly publicized only if the pendency of the legislation or the legislation's general terms, purpose, or effect are known to a significant segment of the general public (as opposed to the particular interest groups directly affected) in the area in which the paid mass media advertisement appears. Treas. Reg. §56.4911-2(b)(5)(iii)(C). 50. (a) By not including any call to action in an issue advertisement, a public charity can engage in strong advocacy without being grassroots lobbying. Two commentators provide the following example of a full page advertisement published in a newspaper with national circulation that does not satisfy the definition of grassroots lobbying: Wetlands are valuable ecosystems that are home to many endangered species in our country and contribute to the wider health and well-being of our environment. Adequate preservation of our wetlands is critical to the conservation of many threatened species of animals and to the conservation of much of our nation's water resources. The U.S. Congress is fast becoming one of the major threats to our healthy environment and to the preservation of

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		wetlands. The Wildlife and Wetlands Conservation Act would actually decrease current regulations governing the use of wetlands and provide tax incentives for development of certain wetlands under protection. More than ever, we need to strengthen the protections afforded to our nation's wetlands. Studies show that wetlands preservation is the key to stimulating the restoration of many damaged ecosystems and to ensuring an adequate water supply for future generations. Now is the time to stand up for a healthy environment and ensure that critical protections afforded under the law are not eroded. Working together, concerned citizens can continue to improve the health of our wetlands by ensuring that they are adequately protected. Congress should say "NO" to the Wildlife and Wetlands Conservation Act. WETLANDS: THE KEY TO OUR ENVIRONMENT'S FUTURE Sponsored by Local Conservation Organization, Rural Community Development Corporation Advocates for Healthy Rivers and Save the Wetlands! [Celia Roady & Kimberly Eney, "Advocacy by Section 501(c)(3) Organizations–Federal Tax Law Restrictions on Lobbying," Taxation of Exempts 13, 17-18 (Sept./Oct. 2012)] (b) The wetlands advertisement will be treated as grassroots

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		lobbying if it satisfies the rule for paid advertisements appearing in the mass media within two weeks before a vote of a legislative body or committee thereof (but not a subcommittee) on highly publicized legislation. EXCEPTION TO GRASSROOTS LOBBYING UNDER SECTION 4911 FOR MEMBERSHIP COMMUNICATIONS 51. (a) Expenditures for a communication that refers to, and reflects a view on, specific legislation are not lobbying expenditures if: (i) the communication is directed only to members of the organization; (ii) the specific legislation that the communication refers to, and reflects a view on, is of direct interest to the organization and its members; (iii) the communication does not directly encourage the member to engage in direct lobbying (whether individually or through the organization); and (iv) the communication does not directly encourage the member to engage in grassroots lobbying (whether individually or through the organization). I.R.C. §4911(d)(2)(D) and (3); Treas. Reg. §56.4911-5(b). (b) Expenditures for a communication that refers to, and reflects a view on, specific legislation, and that satisfies the requirements of clauses (i), (ii), and (iv) of subparagraph (a), but not the requirements of clause (iii) of subparagraph (a), are treated as expenditures for direct lobbying. Treas. Reg. §56.4911-5(c). (c) Expenditures for a communication that refers to, and reflects a view on, specific legislation, and that satisfies the

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		requirements of clauses (i) and (ii) of subparagraph (a), but not the requirements of clause (iv) of subparagraph (a), are treated as expenditures for grassroots lobbying regardless of whether the communication satisfies the requirements of clause (iii) of subparagraph (a). Treas. Reg. §56.4911-5(d). (d) A person is a member of an electing public charity if the person: (i) pays dues or makes a contribution of more than a nominal amount; (ii) makes a contribution of more than a nominal amount of time; or (ii) is one of a limited number of "honorary" or "life" members who have more than a nominal connection with the charity, and who have been chosen for a valid reason (such as length of service to the organization, or involvement in activities forming the basis of the charity's exemption) unrelated to the charity's dissemination of information to its members. Treas. Reg. §56.4911-5(f)(1). (e) A person does not become a member of an electing public charity by becoming a Facebook friend of the organization, or signing up for its e-mail list. (f) Communications directed only to an organization's members that contain a call to action are direct lobbying. Treas. Reg. §56.4911-5(c). Organizations that wish to limit communications to their members should not use a publicly accessible Website. Rather, they should use e-mail, text messages, and password protected portions of Websites. (g) Communications on Facebook, Twitter, and an organization's publicly accessible Website that contain a call

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		to action are likely grassroots lobbying. This treatment applies even if the organization directs the call to action only to its members. Treas. Reg. §56.4911-5(d). <u>OTHER EXCEPTIONS TO LOBBYING UNDER SECTION 4911</u> 52. (a) The regulations under Section 4911 contain exceptions similar to the exceptions to lobbying for private foundations under Section 4945 discussed in Paragraph 41 above. These exceptions are for nonpartisan analysis, study, or research, I.R.C. §4911(d)(2)(A); Treas. Reg. §56.4911-2(c)(1); examinations and discussions of broad social, economic, and similar problems, Treas. Reg. §56.4911-2(c)(2); requests for technical advice, I.R.C. §4911(d)(2)(B); Treas. Reg. §56.4911-2(c)(3); and communications pertaining to an organization's self-defense, I.R.C. §4911(d)(2)(C);Treas. Reg. §56.4911-2(c)(4). The Section 4911 regulations are different from the Section 4945 regulations with respect to the exception for nonpartisan analysis, study, or research. (b) The Section 4911 regulations define nonpartisan analysis, study, or research as an independent and objective exposition of a particular subject matter. It may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. Treas. Reg. §56.4911-2(c)(1)(ii). (c) A communication that reflects a view on specific legislation does not come within the exception for

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		nonpartisan analysis, study, or research if the communication directly encourages the recipient to take action with respect to the legislation. Treas. Reg. §56.4911-2(c)(1)(vi). A communication directly encourages the recipient to take action when it: (i) states that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation; (ii) states the address, telephone number, or similar information of a legislator or an employee of a legislative body; or (iii) provides a petition, tear-off postcard or similar material for the recipient to communicate with a legislator or an employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of so facilitating contact with the government official or employee is to influence legislation). Treas. Reg. §56.4911-2(b)(2)(iii)(A)-(C). (d) A communication would encourage the recipient to take action with respect to legislation, but not directly encourage action, if the communication does no more than specifically identify one or more legislators who will vote on the

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		legislation as: (i) opposing the communication's view with respect to the legislation; (ii) being undecided with respect to the legislation; (iii) being the recipient's representative in the legislature; or (iv) being a member of the legislative committee or subcommittee that will consider the legislation. Treas. Reg. §56.4911-2(c)(1)(vi). (e) Subsequent use of a nonpartisan analysis, study, or research for grassroots lobbying can cause the work to be treated as grassroots lobbying. Treas. Reg. §56.4911-2(c)(1)(v). When advocacy communications or research materials are subsequently accompanied by a direct encouragement for recipients to take action with respect to legislation, the advocacy communications or research materials themselves are treated as grassroots lobbying communications unless the organization's primary purpose in undertaking or preparing the advocacy communications or research materials was not for use in lobbying. In that case, all expenses of preparing and distributing the advocacy communications or research materials are treated as grassroots expenditures. The characterization of expenditures as grassroots lobbying expenditures applies only to expenditures paid less than six months before the first use of the advocacy communications or research materials with a direct encouragement to action. Treas. Reg. §56.4911-2(b)(2)(v)(C)-(D). (f) The primary purpose will not be considered to be for use in lobbying if, prior to or contemporaneously with the use of

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		the advocacy communications or research materials with the direct encouragement to action, the organization makes a substantial nonlobbying distribution without the direct encouragement to action. Whether a distribution is substantial will be determined by reference to all the facts and circumstances, including the normal distribution pattern of similar nonpartisan analyses, studies, or research by that and similar organizations. Treas. Reg. §56.4911-2(b)(2)(v)(E). (g) A public charity can contact and seek to persuade executive branch officials with respect to regulations and administrative policies as long as the public charity's principal purpose is not to influence legislation. I.R.C. §4911(d)(2)(E). 53. (a) If a Section 501(c)(3) organization is not comfortable that it will satisfy either the insubstantiality test or the election under Sections 501(h) and 4911, it should form an affiliated, yet separate, Section 501(c)(4) social welfare organization to conduct its lobbying activities. A Section 501(c)(4) organization can engage in unlimited lobbying in furtherance of its tax-exempt social welfare purposes. (b) The requirements for the separation between the Section 501(c)(3) organization and the Section 501(c)(4) organization are: (i) the organizations must be separately organized under applicable state law; (ii) the organizations must keep separate books and records sufficient to show that tax-deductible

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		contributions to the Section 501(c)(3) organization are not used to pay for lobbying; (iii) the organizations must keep separate bank accounts; (iv) if the organizations have common directors, officers, or employees, the organizations must track their time and allocate the time worked to the organization for which services were performed; (v) the organizations must reasonably allocate shared property and services; and (vi) the organizations must conduct all business between each other on arm's length terms. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 552-53 (1983) (Blackmun, J., concurring); Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) (each corporation is a separate taxable entity for federal income tax purposes if the corporation is formed for valid business purposes, and is not a sham, an agency, or instrumentality); Ward I. Thomas & Judith Kindell, Affiliations Among Political, Lobbying, and Educational Organizations (2000) (available at www.irs.gov/pub/irs0-tege/eotopics00.pdf). PROHIBITION ON LOBBYING BY PRIVATE FOUNDATIONS UNDER SECTION 4945 54. (a) A private foundation cannot make expenditures "to carry on propaganda, or otherwise to attempt to influence legislation." I.R.C. §4945(d)(1). A private foundation cannot pay or incur any amount for any attempt to influence legislation through an attempt to affect the opinion of the general public or any segment thereof, or through communication with any member or employee of a

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		legislative body, or with any other government official or employee who may participate in the formulation of the legislation. (b) Legislation means action by Congress, any state legislature, any local council, or similar legislative body, or by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure with respect to specific legislative proposals. Treas. Reg. §§53.4945-2(a)(1) and 56.4911-2(d)(1). Legislation does not include action by executive, judicial, or administrative bodies. The prohibition on lobbying applies to contacting administrative agency employees who have legislative responsibilities. (c) The exceptions to the prohibition on lobbying by private foundations are set forth in Paragraph 41. (d) In the following situations a private foundation may make grants to public charities that lobby: (i) A private foundation may make a grant to a public charity that has made an election under Sections 501(h) and 4911 when the public charity will use the grant for membership communications that are not lobbying expenditures under Treas. Reg. §56.4911-5(b). Treas. Reg. §53.4945-2(a)(2). (ii) A private foundation may make a general support grant to a public charity when the grant is not earmarked for lobbying. A grant is earmarked when it is made under a written or oral agreement that the grant will be used for specific purposes.

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		This rule applies without regard to whether the public charity has made an election under Sections 501(h) and 4911. Treas. Reg. §53.4945-2(a)(5)-(6)(i). (iii) A private foundation may make a specific project grant to a public charity when the total amount that the foundation gives to the public charity in a taxable year for that project, plus any other grants given by the foundation for the same project for the same year, do not exceed the amount budgeted by the public charity for nonlobbying programs. If the grant is for more than one year, this rule applies to each year of the grant with the amount of the grant measured by the amount actually disbursed by the private foundation in each year, or divided equally between years, at the private foundation's option. This rule applies without regard to whether the public charity has made an election under Sections 501(h) and 4911. Treas. Reg. §53.4945-2(a)(6)(ii). For purposes of determining the amount budgeted, a private foundation may rely on budget documents or other sufficient evidence provided by the public charity (such as a signed statement by an authorized officer, director, or trustee) showing the proposed budget of the specific project, unless the private foundation doubts, or in light of all the facts and circumstances reasonably should doubt, the accuracy or reliability of the documents. Treas. Reg. §53.4945-2(a)(6)(iii). (iv) A private foundation may make a grant to another organization upon the condition that the organization obtain a

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		matching support appropriation from a governmental body. Treas. Reg. §53.4945-2(a)(3). (e) A private foundation does not engage in lobbying when carrying on discussions with officials of governmental bodies as long as: (i) The subject of the discussion is a program that is jointly funded by the foundation and the government, or is a new program that may be jointly funded by the foundation and the government; (ii) The discussions are undertaken for the purpose of exchanging data and information on the subject matter of the program; and (iii) The discussions are not undertaken by foundation managers to make any direct attempt to persuade governmental officials or employees to take particular positions on specific legislative issues other than the program. Treas. Reg. §53.4945-2(a)(3)(i)-(iii). 55. (a) A private foundation that engages in impermissible lobbying, or makes a grant for impermissible lobbying, makes a taxable expenditure subject to excise tax. An initial first-tier excise tax of 20% of the amount of each taxable expenditure is imposed on the foundation. I.R.C. §4945(a)(1). (b) When the first-tier excise tax is imposed on the

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		foundation, an initial first-tier excise tax of 5% of each taxable expenditure is imposed on the agreement of any foundation manager to the making of the expenditure knowing that it is a taxable expenditure, unless the agreement is not willful and is due to reasonable cause. The tax is imposed on any manager who agreed to the making of the expenditure. I.R.C. §4945(a)(2). (c) The managers subject to the tax are those who are authorized to approve, or to exercise discretion in recommending the approval of, the making of the expenditure by the foundation, and those managers who are members of a group that is so authorized, such as the board of directors or trustees. Treas. Reg. §53.4945-1(a)(2)(i). The tax does not apply to managers who do not approve the expenditure. Therefore, managers whose participation is ministerial, such certifying the availability of funds for the expenditure or signing a check, should not be subject to the tax. (d) The IRS may abate the first-tier taxes if the foundation establishes that the violation was due to reasonable cause, not to willful neglect, and the foundation corrects the violation. I.R.C. §4962(a). (e) A second-tier excise tax of 100% of the amount of each taxable expenditure is imposed on the foundation if the expenditure is not corrected within the taxable period. I.R.C. §4945(b)(1). (f) When the second-tier excise tax is imposed on the

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		foundation, a second-tier excise tax of 50% of the amount of each taxable expenditure is imposed on any foundation manager who refused to agree to any part of the correction. I.R.C. §4945(b)(2). (g) The taxable period begins with the date of the taxable expenditure, and ends on the earlier of the date when: (i) a deficiency notice for the first-tier tax on the foundation is mailed, and (ii) the first tier tax on the foundation is assessed. I.R.C. §4945(i)(2). (h) The IRS cannot assess the second-tier excise tax unless a foundation manager receives a notice or request to correct the taxable expenditure. Thorne Foundation v. Commissioner, 99 T.C. 67 (1999). (i) The maximum tax that the IRS can impose in the aggregate on all foundation managers for a single taxable expenditure is $10,000 for the first-tier tax, and $20,000 for the second-tier tax. I.R.C. §4945(c)(2). If more than one manager is liable for the same first-tier tax or second-tier tax, their liability is joint and several; the IRS can collect the entire amount or any portion thereof from any one or more of them. I.R.C. §4945(c)(1); Treas. Reg. §53.4945-1(c)(1). (j) The second-tier tax is abated if the taxable expenditure is corrected within the correction period. I.R.C. §4961(a). The correction period begins with the date of the taxable expenditure, and ends ninety days after the mailing of a notice of deficiency for the second-tier tax. This period may

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		be extended by: (i) any period in which assessment of a deficiency is prohibited under Section 6213(a); and (ii) any other period that the IRS determines to be reasonable and necessary to make the correction. I.R.C. §4963(e)(1). (k) Correction means recovering part or all of the expenditure to the extent recovery is possible, and if full recovery is not possible, such additional corrective action as prescribed by regulation. I.R.C. §4945(i)(1). Additional corrective actions are: (i) the foundation withhold any unpaid funds due the grantee; (ii) the foundation not make any further grants to the grantee; (iii) in addition to any generally required reports, the foundation submit periodic (e.g., quarterly) reports of all its expenditures; (iv) improved methods for the foundation to exercise expenditure responsibility; (v) improved methods for the foundation to select recipients of individual grants; and (vi) other actions. Treas. Reg. §53.4945-1(d)(1). (l) If a person becomes liable for the first-tier tax or second-tier tax by reason of any act or failure to act that is not due to reasonable cause, and such person has theretofore been liable for the tax, or such act or failure to act is both willful and flagrant, then that person is liable for a penalty equal to the amount of the tax. The tax is assessable at any time. I.R.C. §6684. (m) In addition, if there have been either willful repeated acts or failures to act, or a willful and flagrant act or failure to act, that gives rise to liability for the first-tier tax or second-tier

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		tax, then the IRS can impose a tax on the foundation equal to the lesser of aggregate tax benefit resulting from the foundation's Section 501(c)(3) status, and the value of the foundation's net assets. I.R.C §507(a)(2) and (c). The IRS can abate the tax if the foundation distributes all its net assets to certain charitable organizations, or a State official notifies the IRS that corrective action has been taken under State law. I.R.C §507(g).

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
VOTER REGISTRATION AND GET-OUT-THE-VOTE DRIVES		
	1. A corporation can make voter registration and get-out-the-vote communications to the general public, provided that they do not expressly advocate the election or defeat of any clearly identified candidate(s), or candidates of a clearly identified political party. A corporation can make these communications through posters, billboards, broadcasting media, newspapers, newsletters, brochures, or similar means of communication with the general public. 11 C.F.R. §114.4(c)(2). Under Citizens United, these rules are no longer valid. However, the corporation cannot coordinate the preparation and distribution of these communications with any candidate or political party. 2. A corporation can distribute to the general public, or reprint in whole and distribute to the general public, any voter registration or voting information, such as instructional materials, produced by official election administrators. A corporation can distribute official registration forms by mail to the general public, and if permitted by state law, absentee ballots to the general public. The corporation cannot, in connection with any such distribution, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party, and cannot encourage registration with any particular political party. 11 C.F.R. §114.4(c)(3); FEC Advisory Opinion No. 1980-55; FEC Advisory Opinion No. 1980-33; FEC Advisory Opinion No. 1980-2. Under Citizens United, these rules are no longer valid. 3. A corporation can support or conduct voter registration and	1. Public charities can conduct nonpartisan voter registration and get-out-the-vote drives. T.A.M. 9117001 (April 26, 1991). The drives should: (a) be limited to urging persons to register to vote or vote, and informing them of the hours and places for registering or voting; (b) mention no candidates or all candidates; (c) not mention any political party other than to identify the party affiliation of the candidates named; and (d) the services offered as part of the drives should be made available without regard to a voter's political preference. 2002 CPE Text, at 379. See also Treas. Reg. §1.527-6(b)(5) ("[T]o be nonpartisan, voter registration and 'get-out-the-vote' campaigns must not be specifically identified by the organization with any candidate or political party."). 2. (a) The public charity should choose the geographic area for the drive based on nonpartisan criteria, and not with a purpose to influence the outcome of an election. For example, a public charity can choose a geographic area based on the number of the public charity's members who reside in it, but not because the area's Congressional representative is an important supporter of the charity in Congress. A public charity can also review prior voter registration lists to identify unregistered voters, and choose areas that have historically low voter turnout, PLR 9223050,

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
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	get-out-the-vote drives aimed at the general public, including providing transportation to the places of registration or the polls in accordance with the following requirements: (a) The corporation does not make any communication expressly advocating the election or defeat of any clearly identified candidate(s), or candidates of a clearly identified party. Under Citizens United, this rule is no longer valid. (b) The registration or get-out-the-vote drive is not coordinated with any candidate(s) or political party; (c) The voter registration drive is not directed primarily to individuals previously registered with, or intending to register with the political party favored by the corporation. The get-out-the-vote drive is not directed primarily to individuals currently registered with the political party favored by the corporation. Under Citizens United, this rule is no longer valid; (d) These services are made available without regard to the voter's political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, are not withheld or refused based on support for or opposition to particular candidates or political party. Under Citizens United, this rule is no longer valid; (e) Individuals conducting the voter registration or get-out-the-vote drive are not paid on the basis of the number of	but should not use prior voter registration lists to target voters who are registered as belonging to a particular party. (b) In addition, a public charity should not: (i) choose areas in coordination with a candidate or political party; (ii) choose areas in an effort to defeat candidates whose views are contrary to the public charity's views. T.A.M. 9117001 (April 26, 1991); (iii) choose an area because a candidate in the area is a member of the public charity; (iv) focus exclusively on swing districts; and (v) inform voters of the public charity's positions on the issues most important to it and contemporaneously inform them of which candidates support or oppose its positions. See also PLR 199925051 (voter drive was partisan "due to the intentional and deliberate targeting of individual voters or groups of voters on the basis of their expected preference for pro-issue candidates, as well as the timing of the dissemination and format of the materials used."); T.A.M. 8936002 (Sept. 8, 1989) ("The presentation of a particular viewpoint on controversial matters consistent with the criteria set forth in Rev. Proc. 86-43…may be educational within the meaning of section 501(c)(3) of the Code. Public presentation by an exempt organization of such broad issues as, for example, matters involving defense, economics, or social concerns would not ordinarily be seen as affecting voters' choices in a manner contrary to the prohibition on political activity even if they happen to coincide with or overlap a political campaign.") ("The C project [of get-out-the-vote advertisements] presents a very close call because, while the ads could be viewed as focusing attention on

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	individuals registered or transported who support one or more particular candidates or political party; and (f) The corporation notifies those receiving information or assistance of the requirements of (d) above. The notification must be made in writing at the time of the registration or get-out-the vote drive. 11 C.F.R. §114.4(d). Under Citizens United, this rule is no longer valid. 4. (a) In FEC Advisory Opinion No. 2004-7, the FEC addressed the scope of permissible corporate get-out-the-vote activity. MTV planned to conduct a "Prelection," an online survey of young people to determine who they thought should be President. Voter education was a critical part of the Prelection. The voter education activities incorporated information on presidential candidates compiled by Project Vote Smart on the Chooseorlose.com Website, links to the presidential candidates' Websites, and links to nonpartisan sources of information on the Web. MTV would ask participating candidates to submit statements or position papers to MTV for either on-air or on-line usage. (b) Prelection participants received follow-up messages encouraging them to vote in the November general election and to continue to educate themselves about the candidates. These messages would be sent to all participants who have registered to vote in the general election, regardless of whom they "voted" for in the Prelection. These messages would refer to the results and analysis of the Prelection, but	issues of war and peace during the 1984 election campaign, individuals listening to the ads would generally understand them to support or oppose a candidate in an election campaign. The timing of the release of the ads so close to November vote, even though the reference was changed to 'join the debate,' is also troublesome. Taking into account all facts and circumstances, especially that it is arguable that the ads could be viewed as nonpartisan, we reluctantly conclude A, through its C project, probably did not intervene in a political campaign on behalf of or in opposition to candidate for public office."). See discussion of Rev. Proc. 86-43 in Paragraph 3 of the I.R.C. column for "Voter Guides." 3. A public charity should not: (a) conduct a voter registration drive and give an affiliated Section 501(c)(4) organization, to the exclusion of any other group, its list of new voters; (b) conduct classes in voter registration and get-out-the-vote drives primarily for employees of the affiliated Section 501(c)(4) organization, who then work for only one candidate; (c) lease a mailing list from a PAC, and then target the names on the list for a voter registration or get-out-the-vote drive; or (d) pay the costs of training sessions and issue workshops when advertisements state that the Section 501(c)(4) organization sponsors these activities. 4. A public charity cannot provide voter registration lists or other information that it collects during voter registration drives to candidates, political parties, PACs, or politically active Section 501(c)(4) organizations because the Section

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	were not coordinated with any candidate or political party or political committee. (c) Follow-up communications to Prelection participants would be sent via electronic mail or text messages some time after the results of the Prelection were announced. Since these communications by themselves would not constitute promotion or publicizing of the Prelection programming, and given that these communications would be directed only to Prelection participants whose voting preferences were already ascertained by MTV, the follow-up communications would not fall within the media exemption to the definition of contribution or expenditure. The FEC opined that these messages were corporate get-out-the-vote activities subject to 11 C.F.R. §114(c)(2). To the extent that the follow-up messages contained express advocacy, they would violate 2 U.S.C. §441b. Under Citizens United, this aspect of the advisory opinion is no longer valid. (d) The FEC also opined that providing election-related educational materials at community events was not within MTV's press function. Therefore, the media exemption would not apply. MTV would be acting as a corporation when engaging in this activity. Thus, when providing voter registration and get-out-the-vote information at community events, MTV could not expressly advocate the election or defeat of a clearly identified candidate or political party. Likewise, MTV could provide voter guides that complied with 11 C.F.R. §114.4(c)(5). Under Citizens United, this aspect of the advisory opinion is no longer valid.	501(c)(3) organization would use its assets for political purposes. The Section 501(c)(3) organization must sell or lease the list and information for fair market value. 5. In Fact Sheet 2006-17 (Feb. 2006), the IRS provided the following examples of voter registration and get-out-the-vote drives: Example 1: B, a section 501(c)(3) organization that promotes community involvement, sets up a booth at the state fair where citizens can register to vote. The signs and banners in and around the booth give only the name of the organization, the date of the next upcoming statewide election, and notice of the opportunity to register. No reference to any candidate or political party is made by the volunteers staffing the booth or in the materials available at the booth, other than the official voter registration forms which allow registrants to select a party affiliation. B is not engaged in political campaign intervention when it operates this voter registration booth. The IRS also used this example in Rev. Rul. 2007-41, Situation 1, 2007-25 I.R.B. 1421, 1422 (June 18, 2007), and IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 13 (Nov. 2013). Example 2: C is a section 501(c)(3) organization that educates the public on environmental issues. Candidate G is running for the state legislature and an important element of her platform is challenging the environmental policies of the incumbent. Shortly before the election, C sets up a

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	5. A corporation can make contributions to a Section 501(c)(3) organization whose sole purpose is to conduct voter registration drives. FEC Advisory Opinion No. 1980-92. 6. A corporation can, together with a Section 501(c)(3) organization, sponsor a series of video tapes featuring Members of Congress who discuss Congress and encourage viewers to vote. FEC Advisory Opinion No. 1991-17. 7. A corporation can pay for newspaper advertisements that encourage the general public to register and vote. FEC Advisory Opinion No. 1980-20. 8. A federal candidate and officeholder who also serves as a national party committee officer can contribute personal funds to organizations engaging in voter registration activity as defined in 11 C.F.R. §100.24(a)(2). The contributions to each organization cannot be in amounts that are so large, or in amounts that constitute such a substantial percentage of the organization's receipts, that the organization would be considered financed by the officeholder. FEC Advisory Opinion No. 2004-25.	telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C's representative tells the voter about the importance of environmental issues and asks questions about the voter's views on these issues. If the voter appears to agree with the incumbent's position, C's representative thanks the voter and ends the call. If the voter appears to agree with Candidate G's position, C's representative reminds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls. C is engaged in political campaign intervention when it conducts this get-out-the-vote drive. The IRS also used this example in Rev. Rul. 2007-41, Situation 2, 2007-25 I.R.B. 1421, 1422 (June 18, 2007). 6. In Publication 1828, Tax Guide for Churches and Religious Organizations, Example 4, at 13 (Nov. 2013), the IRS provides the following example of an impermissible get-out-the-vote drive: <u>Example 4</u>: Church C is a section 501(c)(3) organization. C's activities include educating its members on family issues involving moral values. Candidate G is running for state legislature and an important element of her platform is challenging the incumbent's position on family issues. Shortly before the election, C sets up a telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C's representative tells the voter about the moral importance of family issues and asks questions about the voter's views on

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		these issues. If the voter appears to agree with the incumbent's position, C's representative thanks the voter and ends the call. If the voter appears to agree with Candidate G's position, C's representative reminds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls. C is engaged in political campaign intervention when it conducts this get-out-the-vote drive. 7. Private foundations can conduct nonpartisan voter registration drives that satisfy the following requirements, and can make grants to another private foundation or a public charity for nonpartisan voter registration drives that satisfy the following requirements: (a) the grant supports only nonpartisan activity; (b) the grant is not used for only one election period; (c) the activity supported by the grant is to be conducted in five or more states; (d) the private foundation spends at least 85% of its income directly for the active conduct (as defined in I.R.C. §4942(j)(3)) of the purposes for which it is organized; (e) the private foundation receives at least 85% of its support (other than Section 509(e) gross investment income) from exempt organizations, the general public, governmental units, or any combination of the foregoing; no more than 25% of this support is from any one exempt organization;

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		and not more than half of its support comes from gross investment income; and (f) contributions to the private foundation for voter registration drives are not subject to conditions that they must be used in specified states, possessions of the United States, or political subdivisions or other areas of any of the foregoing, or in the District of Columbia, or that they must be used in a specified election period. I.R.C. §4945(d)(2) and (f); H. Rep. No. 91-413 (Part 1), 91st Cong., 1st Sess. (1969), 1969-3 C.B. 200, 222; Treas. Reg. §53.4945-3(b); PLR 9629025 and 9223050. 8. A private foundation does not have to exercise expenditure responsibility for the grants described in Paragraph 7. Treas. Reg. §§53.4945-3(b)(2) and 53.4945-5(a)(1). 9. Private foundations that engage in impermissible voter registration drives or make grants for impermissible voter registration drives are subject to the excise tax regime described in Paragraph 55 of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering." 10. Private foundations can engage in nonpartisan election-related activities, other than voter registration drives, get-out-the-vote drives, voter education projects, and candidate forums, free of the limitations of Code Section 4945(d)(2). IRS Information Letter 2004-0169 (Dec. 9, 2004). 11. A community foundation that is not a private foundation can

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		conduct voter registration drives free of the limitations of Code Section 4945(f). A community foundation can engage in nonpartisan election-related activities, such as voter registration drives, get-out-the-vote drives, voter education projects, and candidate forums, as long as they do not constitute prohibited campaign intervention under Section 501(c)(3). IRS Information Letter 2004-0169 (Dec. 9, 2004). 12. The I.R.C. §527(f) tax on exempt function expenditures, to which Section 501(c)(4) organizations are subject, does not apply to nonpartisan voter registration and get-out-the-vote drives. Treas. Reg. §1.527-6(b)(5). Nonpartisan means the drive is not specifically identified by the organization with any candidate or political party. Id.; see also PLR 199925051 (voter registration and get-out-the-vote drives are partisan when used "to increase the election prospects of pro-issue candidates as a group").

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
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	1. A corporation can prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a Section 501(c)(3) or 501(c)(4) organization, provided that the voter guides comply with the provisions described in either Paragraph 2 or 3. The voter guide can include biographical information on each candidate, such as education, prior and current employment, offices held, and community involvement. Under Citizens United, other than the prohibitions on acting in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees, or their agents, the rules in Paragraphs 1 to 3 are no longer valid. 2. The corporation must not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party. 3. (a) The corporation must not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents, and distribution of the voter guide; (b) All the candidates for a particular seat or office are provided an equal opportunity to respond, except that in the	1. Distribution of voter guides, responses to candidate questionnaires, and incumbent voting records (often known as legislative score cards or report cards) is permissible if they: (a) do not contain editorial comment; (b) cover a broad range of issues, rather than limited to the issues most important to the organization. The latter practice invites readers to compare the organization's positions with the candidates' positions; (c) with respect to incumbent voting records, cover all legislators representing the organization's region, and not identify which incumbents are candidates for re-election; (d) with respect to voter guides and responses to candidate questionnaires, cover all candidates for a public office, or at least all viable candidates; (e) are not deliberately distributed to coincide with an election; (f) are distributed during a campaign in the same manner as during the year; and (g) contain a disclaimer stating that the organization is nonpartisan and does not endorse any party or candidate. Rev. Rul. 78-248, 1978-1 C.B. 154; PLR 200836033 (prohibited campaign intervention occurred when organization distributed voter guides in which the

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	case of Presidential and Vice Presidential candidates the corporation may choose to direct the questions only to those candidates who are seeking the nomination of a particular political party in a contested primary election, or appear on the general election ballot in the state(s) in which the voter guide is distributed or appear on the general election ballot in enough states to win a majority of the electoral votes; (c) No candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses; (d) The voter guide and its accompanying materials do not contain an electioneering message; and (e) The voter guide and its accompanying materials do not score or rate the candidates' responses in such a way as to convey an electioneering message. 11 C.F.R. §114.4(c)(5).	Democratic candidates regularly had "No Response" listed after all or part of the issues, and very few Republican candidates were listed without a complete list of "Opposes" or "Supports" underneath their names and pictures; the lack of responses from Democratic candidates and the wording and choice of issues to create a particular response along party lines was significant; the summary descriptions of the issues, such as, "Establishment of a State Income Tax," "Abortion on Demand," and "Parental Choice in Education (Vouchers)," were so vague that they did not adequately cover any of the issues and created the possible distortion of the candidate's position when translating a vote on legislation to a summary description; the voter guides listed the names of a neutral group of candidates, but fully reported the positions of only some of the Democratic candidates and almost all of the positions of the Republican candidates; and the organization distributed the voter guides to previously identified conservative churches and conservative individuals); PLR 199925051 (a critical factor in determining whether a voter guide is nonpartisan "is whether the guide evidences a bias or preference with respect to the views of any candidate or group of candidates."); PLR 9808037; PLR 9635003. 2. If a candidate questionnaire contains twenty questions, and the organization publishes the answers to ten of the questions but selects which ten answers to publish based on the electoral district in which it distributes the answers, the IRS will likely find prohibited campaign intervention.

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		3. If voter guides, responses to candidate questionnaires, and incumbent voting records cover a narrow range of issues, especially the ones of most importance to the organization, they should: (a) be distributed only to the organization's members. If the organization posts the document on its Website, access should be limited to a members only area. Cf. FEC Advisory Opinion No. 2006-3 (corporation can create password-restricted Website for PAC that is accessible by current employees in solicitable class using one common user name and password; PAC may provide access to its Website from corporation's government relations Website); FEC Advisory Opinion No. 2000-10 (trade association created members only, password protected portion of Website for its PAC that contained a solicitation authorization form for members to download and print; arrangement was not a PAC solicitation subject to the disclaimer required by 2 U.S.C. §441d); FEC Advisory Opinion No. 1997-16 (membership organization prohibited from making a list of candidate endorsements available on its Websites unless it limited access to the list to only its members); (b) have an initial distribution shortly after the close of a legislative session, which shows an educational purpose, rather than a purpose to influence the outcome of an election; (c) not be deliberately distributed to coincide with an

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		election; (d) be distributed during a campaign in the same manner as during the year; (e) not identify which incumbents are candidates for re-election, not compare incumbents, and not comment on a person's qualifications for public office; (f) cover all legislators representing the organization's region, and not focus on a legislators from a geographic area in which elections are held; (g) contain a statement that the reader should not judge an incumbent based only on selected votes, and recommend that the reader consider other factors, such as performance on legislative committees and constituent service; and (h) contain a disclaimer stating that the organization is nonpartisan and does not endorse any party or candidate. Rev. Proc. 86-43, 1986-2 C.B. 729; Rev. Rul. 80-282, 1980-2 C.B. 178; PLR 200836033 (prohibited campaign intervention occurred when organization distributed legislative score cards to a large number of religious conservatives; the names of Republicans were shown in all capital letters with the highest percentage scores in the score card; the legislator's score was based upon his or her agreement or disagreement with the organization's issues; and the score cards were published and distributed to coincide with the national and state elections); IRS Nondocketed Service Advice Review 20044040E (April

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
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		16, 2004) ("While applicant's literature contained no express statements in support of or in opposition to any specific candidate, it was widely distributed to the public during an election campaign and its emphasis on one area of concern indicates that its purpose is not nonpartisan education. Voters were encouraged to vote for or against candidates based on a candidate's position with respect to the **** issue."). Compare G.C.M. 38,444 (July 15, 1980) (a church could distribute incumbent voting records with a "+" or "-" showing whether the vote was consistent with the church's position; "[I]n the absence of any expressions of endorsement for or opposition to candidates for public office, an organization may publish a newsletter containing voting records and its opinions on issues of interest to it provided that the voting records are not widely distributed to the general public during an election campaign or aimed, in view of all the facts and circumstances, towards affecting any particular election.") with G.C.M. 39,811 (Feb. 9, 1990) (Section 501(c)(3) organization distributed a voters survey on the views of candidates on abortion, homosexual rights, ERA, church-school freedom, and nuclear freeze; organization adjured readers to recognize that, as Christians, they had an obligation, founded in Scripture, to vote conscientiously for godly rule; voters survey violated prohibition on campaign intervention). 4. (a) In IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 12-13 (Nov. 2013), the IRS provides the following guidelines for determining whether a voter guide is nonpartisan:

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		? whether the candidates' positions are compared to the organization's position, ? whether the guide includes a broad range of issues that the candidates would address if elected to the office sought, ? whether the description of issues is neutral, ? whether all candidates for an office are included, and ? whether the descriptions of candidates' positions are either: - the candidates' own words in response to questions, or - a neutral, unbiased and, complete compilation of all candidates' positions. (b) IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 13 (Nov. 2013), contains the following examples of voter guides: Example 1: Church R, a Section 501(c)(3) organization, distributes a voter guide prior to elections. The voter guide consists of a brief statement from the candidates on each issue made in response to a questionnaire sent to all candidates for governor of State I. The issues on the questionnaire cover a wide variety of topics and were selected by Church R based solely on their importance and interest to the electorate as a whole. Neither the questionnaire nor the voter guide, through their content or

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		structure, indicate a bias or preference for any candidate or group of candidates. Church R is not participating or intervening in a political campaign. Example 2: Church S, a Section 501(c)(3) organization distributes a voter guide during an election campaign. The voter guide is prepared using the responses of candidates to a questionnaire sent to candidates for major public offices. Although the questionnaire covers a wide range of topics, the wording of the questions evidence a bias on certain issues. By using a questionnaire structured in this way, Church S is participating or intervening in a political campaign. 5. On September 15, 2005, the IRS approved the application for exemption under Code Section 501(c)(4) of Christian Coalition International ("CCI"). Exempt Organization Tax Journal, at 48 (September/October 2005). In its application, CCI stated it would distribute nonpartisan voter guides through churches and other Section 501(c)(3) organizations that met the following guidelines: (a) The voter guide candidate surveys will include a broad range of issues selected solely on the basis of their importance and interest to the electorate as a whole and will not, in content or structure, evidence a bias or preference with respect to the views of any candidate or group of candidates. (b) The questions will be asked and presented in a clear,

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		complete and unbiased manner. (c) CCI may use different surveys or questionnaires for different races. For example, all House candidates will receive the same candidate surveys or questionnaires, while all Senatorial candidates may receive another survey or questionnaire. Each version of a survey or questionnaire prepared for a race, however, will have the same questions, i.e., all House surveys or questionnaires will be identical and have the same questions. (d) The candidate survey will be distributed to candidates and allow no less than twenty-one days for the candidate to respond. (e) The surveys will require each question to be answered with either "support," "oppose," or "undecided" (or yes, no, or undecided) and only then will the candidate be afforded an opportunity to provide additional comment of up to twenty-five words on the subject of the question. The survey will inform the candidates that only the first twenty-five words on any response will be printed. CCI will not edit or alter candidate statements except to remove profane or scandalous words. Complete candidate surveys and responses will be made available on CCI's Website. (f) Questions displayed on the voter guide will use the same words as the questions to which the candidates were asked to respond. (g) Responses will be adjacent to the question or

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		conspicuously displayed on the same page in a manner that clearly relates the response to the question. (h) The printed voter guides will be initially distributed no later than the second Sunday before the upcoming election to which they apply, and be posted on CCI's Website on or before that date. (i) If permitted under applicable election law, the voter guide will include the candidates' Website addresses. (j) The printed voter guides will display no fewer than six questions asked of the candidate. (k) If a candidate does not respond, CCI will put on the voter guide a statement that no response was provided. CCI will attempt to determine the position of that candidate on each issue present in the voter guide, and represent that position by stating "supports," "opposes," or "undecided" in response to the question. In determining the candidate's position, CCI will prepare a neutral, unbiased, and complete compilation of a candidate's position. CCI will look to sources such as the candidate's stump speeches, newspaper articles, campaign literature, published positions described on the candidate's Website, legislative votes, and legislative votes on single-issue bills. If all or some of the candidate's positions are determined from sources other than the candidate's survey responses, an asterisk or similar symbol will be used on the voter guide and will state that the sources of these positions are available upon request. CCI will display the sources on its

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		Website. If CCI cannot clearly or reasonably determine a candidate's position on the issue, it will reflect the candidate's position as "unknown" or "unclear." 6. The guideline in Paragraph 5(c) requiring the same questions for candidates for the same types of office prevents the framing of questions for particular states or districts so as to promote or attack candidates whose views the organization favors or disfavors. In addition, the guidelines do not require that the questionnaires go to candidates from minor parties. Finally, the questionnaires can focus on the issues of most importance to the organization, as long as the questions are worded in an unbiased manner, and the voter guides are not distributed with other materials stating the organization's views. 7. An unresolved question is if in a two candidate race, one candidate provides answers to a questionnaire and the other candidate does not, can the Section 501(c)(3) organization publish the answers of the one candidate, and state that the other candidate did not provide answers? The IRS can take the position that this approach shows a bias toward a particular candidate, and therefore violates the prohibition against campaign intervention. The Section 501(c)(3) organization can take the position that the decision not to provide answers is solely that of the candidate, and not the organization, and to find prohibited campaign intervention enables the unresponsive candidate to undermine the organization's right to engage in nonpartisan educational activities simply by refusing to

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		provide answers. Cf. Rev. Rul. 2007-41, Situation 8, 2007-25 I.R.B. 1421, 1423 (June 18, 2007) and IRS Fact Sheet 2006-17, Example 8 (Feb. 2006) (Congressional race has four candidates; Section 501(c)(3) organization invites candidates to address its members, one candidate at a regular meeting held on successive weeks; one candidate declines invitation to speak; in the publicity announcing the dates for each of the candidate's speeches, organization includes a statement that the order of the speakers was determined at random and the fourth candidate declined the invitation to speak; the president of the organization makes the same statement in his opening remarks at each meeting; organization's actions do not constitute political campaign intervention). 8. A Section 501(c)(3) organization should not distribute voter guides prepared by a candidate, political party, or PAC because they are prepared to improve or diminish a candidate's prospects for election. 2002 CPE Text, at 372. 9. The rating of elective judicial candidates as "approved," "approved as highly qualified," and "not approved," based on experience and professional ability and character, and without comparisons between candidates, violated the prohibition against campaign intervention. Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989). The ratings were impermissible because they "showed a bias toward particular candidates." 2002 CPE Text, at 350. See also Rev. Rul. 67-368, 1967-2 C.B. 194

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
VOTER GUIDES		
		(organization whose primary activity was rating candidates for public office was not exempt under Code Section 501(c)(4) because the activity was not the promotion of social welfare); cf. FEC v. Christian Coalition, 52 F. Supp. 2d 45, 61 (D.D.C. 1999) (in 1994 the Christian Coalition mailed a six page letter signed by its President, Pat Robertson, and a congressional scorecard entitled, "Reclaiming America." The scorecard contained the voting records of all members of Congress and scored each member based on the member's agreement with the Coalition's position on certain issues; court held that the mailing did not violate FECA because it did not expressly direct the reader to vote or take action based on the ratings, and a reasonable person could have understood the mailing to be an effort to educate Christians on congressional activity; "[Express advocacy] is determined first and foremost by the words used. More specifically, the 'express advocacy' standard requires focus on the verbs."). 10. An organization formed to promote public education engaged in prohibited campaign intervention when it conducted an objective review of the qualifications of school board candidates, and announced the names of those it considered most qualified. Rev. Rul. 67-71, 1967-1 C.B. 125. 11. A Section 501(c)(3) organization that requested candidates to conduct their campaigns in accordance with a code of fair campaign practices, and published the names of candidates who support the code, violated the prohibition

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
VOTER GUIDES		
		against campaign intervention. Rev. Rul. 76-456, 1976-2 C.B. 151.

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	1. (a) A corporation can permit candidates and their representatives to appear on its premises or at a corporate function to address a broad class of employees. If the corporation allows one candidate to appear, all candidates who request to appear must be given a similar opportunity. 11 C.F.R. §114.4(b)(1)(i)-(ii). Unless clearly impractical, the corporation must make similar times and locations available to all candidates who wish to appear. 11 C.F.R. §114.4(b)(1)(vi). Under Citizens United, in the absence of coordinated communication between the corporation and a candidate, the same opportunity requirement no longer applies. (b) The corporation and its PAC cannot, in conjunction with any appearance, expressly advocate the election or defeat of any clearly identified candidate, or candidates of a clearly identified political party, and cannot promote or encourage express advocacy by employees. 11 C.F.R. §114.4(b)(1)(v); FEC Advisory Opinion No. 1999-2; FEC Advisory Opinion No. 1992-5. Under Citizens United, in the absence of coordinated communication between the corporation and a candidate, the prohibition on express advocacy no longer applies. (c) The corporation can discuss with the candidate or the candidate's authorized committee the structure, format, and timing of the candidate's appearance and the candidate's positions on issues, but cannot discuss the candidate's plans, projects, or campaign. 11 C.F.R. §114.4(b)(1)(vii).	1. Candidates often seek permission to appear in their candidate capacity before the members of a Section 501(c)(3) organization, or the public, on the organization's premises. The Section 501(c)(3) organization can agree to the appearance, and should state in all advertisements it pays for and notices of the appearance it issues that the organization does not support or oppose the candidate. The organization should repeat this disclaimer at the appearance when introducing the candidate. In addition, the organization should prohibit any fundraising for the candidate at the appearance. The organization does not have to invite all candidates to the same event, but should invite all candidates to an event with the same level of publicity and with similar expected attendance. 2002 CPE Text, at 381; see also Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1423 (June 18, 2007) and IRS Fact Sheet 2006-17 (Feb. 2006) ("[A]n organization that invites one candidate to speak at its well attended annual banquet, but invites the opposing candidate to speak at a sparsely attended general meeting, will likely have violated the political campaign prohibition, even if the manner of presentation for both speakers is otherwise neutral."); IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 10 (Nov. 2013) (similar language); Letter of Steven T. Miller, Director, Exempt Organizations Division, Internal Revenue Service to Treasurers of Democratic National Committee, Republican National Committee, America First National Committee, Constitution Party National Committee, Green Party of the United States, Libertarian

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	(d) If the corporation permits news coverage for any appearance, it must allow coverage for all other candidates who appear, and all news media must be afforded equal access. 11 C.F.R. §114.4(b)(1)(viii). Equal access means the corporation must provide advance notice regarding the appearance to the representatives of the news media whom the corporation customarily contacts and other representatives of the news media upon request, and allow all representatives of the news media to cover or carry the appearance, through the use of pooling arrangements if necessary. 11 C.F.R. §114.3(c)(2)(iv). Under Citizens United, in the absence of coordinated communication, the equal access requirement no longer applies. 2. A Section 501(c)(3) organization's activities in organizing and sponsoring appearances of presidential candidates at a public meeting would not produce nonpartisan communications when the candidates would advocate their own election, and would be identified as candidates in their introductions and literature distributed at the public meeting. Furthermore, the appearances would not be a nonpartisan debate because there would not be a face-to-face confrontation of at least two candidates. FEC Advisory Opinion No. 1986-37. 3. (a) An incorporated Section 501(c)(3) educational institution can sponsor appearances of candidates, candidates' representatives, or representatives of political parties at which these persons address or meet the institution's academic community or general public (whichever is invited) on the	National Committee Inc., and Natural Law Party of the United States, June 10, 2004 (available at http://www.irs.gov/newsroom/article/0,,id= 123922,00.html). 2. A noncommercial Section 501(c)(3) broadcasting station can provide candidates with free air time to present their views as long as the station grants all candidates equal access in accordance with the requirements of the Federal Communications Act of 1934. In addition, before and after each broadcast, the station makes the statement that the views expressed are those of the candidate and not those of the station; that the station endorses no candidate or viewpoint; that the presentation is made as a public service in the interest of informing the electorate; and that equal opportunities will be presented to all bona fide legally qualified candidates for the same public office to present their views. Rev. Rul. 74-574, 1974-2 C.B. 160; 2002 CPE Text, at 377. 3. (a) IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 11 (Nov. 2013), contains the following example of a permissible candidate appearance: Example 1: Minister E is the minister of Church N. In the month prior to the election, Minister E invited the three Congressional candidates for the district in which Church N is located to address the congregation, one each on three successive Sundays, as part of regular worship services. Each candidate was given an equal opportunity to address

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	institution's premises at no charge or at less than the usual and normal charge, if (i) the institution uses reasonable efforts to ensure that the appearances constitute speeches, question and answer sessions, or similar communications in an academic setting, and uses reasonable efforts to ensure that the appearances are not conducted as campaign rallies or events; and (ii) the institution does not, in conjunction with the appearance, expressly advocate the election or defeat of any clearly identified candidate(s), or candidates of a clearly identified political party, and does not favor any one candidate or political party over any other in allowing the appearances. 11 C.F.R. §114.4(c)(7)(ii). (b) To satisfy these requirements, the educational institution should use reasonable efforts to restrict the presence of campaign banners, posters, balloons, and similar items. (c) The FEC applied a similar rule for public educational institutions, 11 C.F.R. §110.12, in MUR 5392. General Wesley K. Clark, a candidate for the Democratic nomination for President, gave a public lecture at the University of Iowa Law School two days after he announced his candidacy. The University prohibited signs in the lecture hall and the distribution of pamphlets in the building, and cancelled the customary press conference before the lecture. The Dean of the Law School advised General Clark that the lecture must remain academic and not turn into a campaign rally. The Dean also advised the audience that political activities such as banner waving and chanting were not acceptable, and asked that the audience submit written questions, which he	and field questions on a wide variety of topics from the congregation. Minister E's introduction of each candidate included no comments on their qualifications or any indication of a preference for any candidate. The actions do not constitute political campaign intervention by Church N. The IRS used a similar example in Rev. Rul. 2007-41, Situation 7, 2007-25 I.R.B. 1421, 1423 (June 18, 2007), and IRS Fact Sheet 2006-17, Example 7 (Feb. 2006). It is important to note that this example is not a nonpartisan debate under FECA because there is not a face-to-face confrontation of at least two candidates. Thus, the FEC may take the position that the Church has made an impermissible in-kind contribution. See discussion in Paragraph 2 of the FECA column. (b) The IRS elaborated on the prior example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 11 (Nov. 2013): <u>Example 2</u>: The facts are the same as in Example 1 except that there are four candidates in the race rather than three, and one of the candidates declines the invitation to speak. In the publicity announcing the dates for each of the candidate's speeches, Church N includes a statement that the order of the speakers was determined at random and the fourth candidate declined the Church's invitation to speak. Minister E makes the same statement in his opening remarks at each of the meetings where one of the

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	prescreened to exclude questions relating to General Clark's candidacy. In the lecture, General Clark referred to the negative aspects of President Bush's foreign policy and alleged domestic policy failures. The FEC found no reason to believe that a violation of FECA occurred, and that the Law School made reasonable efforts to maintain an academic environment. In addition, the regulation did not prohibit collateral campaign events before or after a sponsored appearance independent of the educational institution. 4. (a) In FEC Advisory Opinion No. 1996-11, the FEC addressed the permissible activities that can occur as part of a candidate's appearance in a noncandidate capacity at the convention of an issue advocacy group. Two Members of Congress, one who is a candidate for re-election, and one a candidate for President, planned to speak at the convention of the National Right to Life Conventions, Inc. ("NRL"), a subsidiary of the National Right to Life Committee, Inc., a Section 501(c)(4) membership organization. Most of the attendees at the convention would be the general public, and most were not voters from the speaker's home district. The campaign committees of the speakers would hold concurrent campaign events at the same hotel as the convention. The speakers could attend the convention in a noncandidate capacity not subject to FECA when (i) all communications by NRL and any person on its behalf, the candidates and their staff, representatives and agents, did not expressly advocate the nomination, election, or defeat of any candidate; (ii) anyone introducing the speakers did not discuss the candidacy except to briefly note the fact that the speaker was a	candidates is speaking. Church N's actions do not constitute political campaign intervention. The IRS also used a similar example in Fact Sheet 2006-17 (Feb. 2006), and Rev. Rul. 2007-41, Situation 8, 2007-25 I.R.B. 1421, 1423 (June 18, 2007). 4. In IRS Fact Sheet 2006-17 (Feb. 2006), the IRS provides the following example of impermissible campaign intervention: <u>Example 9</u>: Minister F is the minister of Church O, a section 501(c)(3) organization. The Sunday before the November election, Minister F invites Senate Candidate X to preach to her congregation during worship services. During his remarks, Candidate X states, "I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday." Minister F invites no other candidate to address her congregation during the Senatorial campaign. Because these activities take place during official church services, they are attributed to Church O. By selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O's actions constitute political campaign intervention. The IRS also used this example in Rev. Rul. 2007-41, Situation 9, 2007-25 I.R.B. 1421, 1423 (June 18, 2007), and IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 11 (Nov. 2013).

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	candidate; (iii) there was no solicitation, making, or acceptance of contributions to the candidate's campaign or distribution of campaign materials at convention functions; (iv) any contribution from the National Right to Life's political committee to a candidate's campaign was not in consideration for the speaker's appearance at the convention; (v) if NRL knew that the candidates' campaign committees would sponsor collateral campaign events at the convention facilities during the convention, NRL did not use its general treasury funds to pay the travel costs for the candidates and their representatives and staff. NRL had to notify each candidate that it would not pay travel costs if the candidate held a collateral campaign event; (vi) NRL did not use its general treasury funds to make expenditures for communications to announce or publicize campaign events when the communications were directed to the general public attending the convention; and (vii) any candidates who wished to advertise in the convention program book paid NRL in advance the usual and normal charge for the advertisements. (b) With respect to NRL providing free video and audio tapes of the speeches to the candidate speakers, NRL could do so regardless of whether the candidates used the tapes to promote their candidacies or to raise funds. An impermissible contribution would result if NRL distributed the taped speeches free of charge to news organizations or to the general public, since the taping and distribution of the candidates' views on the issues addressed at the convention was something of value to the candidates. NRL could sell the	5. In IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 11 (Nov. 2013), the IRS provides the following guidelines for appearances by incumbents and candidates in a noncandidate capacity: Like any other IRC section 501(c)(3) organization, a church or religious organization may invite political candidates (including church members) to speak in a noncandidate capacity. For instance, a political candidate may be a public figure because he or she: (a) currently holds, or formerly held, public office; (b) is considered an expert in a nonpolitical field; or (c) is a celebrity or has led a distinguished military, legal, or public service career. A candidate may choose to attend an event that is open to the public, such as a lecture, concert, or worship service. The candidate's presence at an organization-sponsored event does not, by itself, cause the organization to be engaged in political campaign intervention. However, if the candidate is publicly recognized by the organization, or if the candidate is invited to speak, factors in determining whether the candidate's appearance results in political campaign intervention include the following: ? whether the individual speaks only in a noncandidate capacity; ? whether either the individual or any representative of the church makes any mention of his or her candidacy or the election;

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	tapes to news organizations or the general public for the usual and normal charge. Under 11 C.F.R. §100.7(a)(l)(iii)(B) [now codified at 11 C.F.R. §100.52(d)(2)], usual and normal charge means the price of these goods in the market from which they ordinarily would have been purchased at the time of the contribution. (c) With respect to an NRL-sponsored press conference held at or near the convention site before, during, or after the convention, the candidate speakers could participate in the press conference to discuss pro-life issues and could be identified as candidates so long as: (i) NRL did not endorse the candidates during the press conference; (ii) neither NRL and its agents nor the candidates and their agents expressly advocated the election or defeat of any clearly identified candidate during the press conference; and (iii) the NRL's disbursements for the press conference were de minimis. Disbursements were de minimis if notice of the press conference was distributed only to those news organizations NRL customarily contacted when holding press conferences for other purposes. FEC Advisory Opinion No. 1996-11. 5. A candidate can appear in a noncandidate capacity not subject to FECA when: (a) the event does not involve the solicitation, making, or acceptance of contributions to the candidate's campaign, whether at the event or in the invitations; (b) the event does not involve communications expressly advocating the nomination, election, or defeat of any candidate; (c) the sponsoring organization, and not the candidate, controls the conduct of the event and who is admitted; (d) in any speech	? whether any campaign activity occurs in connection with the candidate's attendance; ? whether the individual is chosen to speak solely for reasons other than candidacy for public office; ? whether the organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present; and ? whether the organization clearly indicates the capacity in which the candidate is appearing and does not mention the individual's political candidacy or the upcoming election in the communications announcing the candidate's attendance at the event. The IRS provided similar guidelines in Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1423-24 (June 18, 2007). 6. In IRS Fact Sheet 2006-17 (Feb. 2006), the IRS provides the following examples of appearances in a noncandidate capacity: <u>Example 10</u>: Historical society P is a section 501(c)(3) organization. Society P is located in the state capital. President G is the president of Society P and customarily acknowledges the presence of any public officials present during meetings. During the state gubernatorial race, Lieutenant Governor Y, a candidate, attends a meeting of the historical society. President G acknowledges the Lieutenant Governor's presence in his customary manner,

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CANDIDATE APPEARANCES AND ADVERTISEMENTS		
	and during any question and answer period, the candidate does not refer to his or her campaign, or to the campaign or qualifications of another candidate; (e) neither the candidate nor his or her staff coordinates or encourages the display of campaign banners or decorations, or the distribution of campaign materials; (f) no collateral campaign events, e.g., luncheons, press conferences and rallies, are held nearby shortly before or after the event; and (g) the sponsoring organization pays any honorarium to the candidate and not the campaign. FEC Advisory Opinion No. 1992-6 (appearance of Presidential candidate David Duke at Vanderbilt University) (cited in FEC Advisory Opinion No. 1996-11 discussed in Paragraph 4 above).	saying "We are happy to have joining us this evening Lieutenant Governor Y." President G makes no reference in his welcome to the Lieutenant Governor's candidacy or the election. Society P has not engaged in political campaign intervention as a result of President G's actions. The IRS also used this example in Rev. Rul. 2007-41, Situation 10, 2007-25 I.R.B. 1421, 1424 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 1, at 12 (Nov. 2013). Example 11: Chairman H is the chairman of the Board of Hospital Q, a section 501(c)(3) organization. Hospital Q is building a new wing. Chairman H invites Congressman Z, the representative for the district containing Hospital Q, to attend the groundbreaking ceremony for the new wing. Congressman Z is running for reelection at the time. Chairman H makes no reference in her introduction to Congressman Z's candidacy or the election. Congressman Z also makes no reference to his candidacy or the election and does not do any fundraising while at Hospital Q. Hospital Q has not intervened in a political campaign. The IRS also used this example in Rev. Rul. 2007-41, Situation 11, 2007-25 I.R.B. 1421, 1424 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 2, at 12 (Nov. 2013). Example 13: Mayor G attends a concert performed by Symphony S, a section 501(c)(3) organization, in City

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
		Park. The concert is free and open to the public. Mayor G is a candidate for reelection, and the concert takes place after the primary and before the general election. During the concert, the chairman of S's board addresses the crowd and says, "I am pleased to see Mayor G here tonight. Without his support, these free concerts in City Park would not be possible. We will need his help if we want these concerts to continue next year so please support Mayor G in November as he has supported us." As a result of these remarks, Symphony S has engaged in political campaign intervention. The IRS also used this example in Rev. Rul. 2007-41, Situation 13, 2007-25 I.R.B. 1421, 1424 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 4, at 12 (Nov. 2013). 7. If a member of the clergy is a candidate, and participates in a worship service as a candidate, the rules in Paragraphs 1, 3, and 4 apply. If a member of the clergy is a candidate, and participates in a worship service solely as a member of the clergy and not as a candidate, the rules in Paragraph 5 apply. 8. In IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 12 (Nov. 2013), the IRS provides the following example of a church member's permissible use of a church newsletter to advise other church members of his or her candidacy: Example 3: Church X is a section 501(c)(3) organization.

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
		X publishes a member newsletter on a regular basis. Individual church members are invited to send in updates about their activities which are printed in each edition of the newsletter. After receiving an update letter from Member Q, Church X prints the following: "Member Q is running for city council in Metropolis." The newsletter does not contain any reference to this election or to Member Q's candidacy other than this statement of fact. Church X has not intervened in a political campaign. 9. Publications of Section 501(c)(3) organizations can accept paid political advertising if: (a) the organization charges a fair market rate. Free or reduced rate advertising is likely to be an impermissible in-kind contribution; (b) the organization accepts the advertising on the same basis as nonpolitical advertising other than for free or at a reduced rate; (c) the organization places a statement preceding the advertisements that they are paid political advertisements and do not reflect the views of the organization. The organization also may wish to state that it is prohibited from endorsing candidates for public office, and the acceptance and publication of an advertisement is not an endorsement; (d) the organization solicits advertisements in a nonpartisan manner according to established guidelines or

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE APPEARANCES AND ADVERTISEMENTS		
		customary business practices; and (e) the organization provides the same treatment to all candidates who wish to advertise. Rev. Rul. 74-574, 1974-2 C.B. 161; 2002 CPE Text, at 383. 10. A Section 501(c)(3) organization should not solicit ads from one candidate while only accepting ads from other candidates. 11. Income from political advertising is unrelated business taxable income subject to tax. I.R.C. §513(c); United States v. American College of Physicians, 475 U.S. 834 (1986); Treas. Reg. §1.512(a)-1(d)(1) and (f); 2002 CPE Text, at 384. 12. With respect to letters to the editor in publications of Section 501(c)(3) organizations, the organization should: (a) select letters for publication based on criteria other than whether the letter supports the organization's position on an issue; (b) publish letters that take positions on both sides of an issue; (c) refrain from publishing letters from candidates and organizations that support or oppose candidates; and (d) place disclaimers that the letters reflect solely the opinions of their authors and not the Section 501(c)(3) organization.

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ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE DEBATES		
	1. (a) A nonprofit organization described in I.R.C. §501(c)(3) or 501(c)(4) that does not endorse, support, or oppose candidates or political parties, can sponsor candidate debates. 11 C.F.R. §§110.13(a)(1) and 114.4(f)(1)-(2). Under Citizens United, in the absence of coordinated communication between the corporation and any candidate, candidate committee, political party committee, or any of their agents, this limitation is no longer valid. (b) The structure of the debates is left to the discretion of the staging organization, provided that the debates include at least two candidates, and the staging organization does not structure the debates to promote or advance one candidate over another. 11 C.F.R. §110.13(b). (c) For all debates, the staging organization must use pre-established objective criteria to determine which candidates may participate. For general election debates, the staging organization cannot use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. For debates held prior to a primary election, caucus, or convention, the staging organization may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party, or independent candidates. 11 C.F.R. §110.13(c). (d) The FEC's regulations do not exceed its statutory authority. Becker v. FEC, 230 F.3d 381 (1st Cir. 2000), cert.	1. Section 501(c)(3) organizations can sponsor candidate debates that provide a fair and neutral forum, and equal time to all legally qualified candidates. Under Rev. Rul. 86-95, 1986-2 C.B. 73, the IRS considers the following criteria in determining whether the organization satisfies this standard: (a) The debate should include all legally qualified candidates for the contested office, unless inviting one or more of the candidates is impractical, or does not further the organization's educational purpose. For example, an organization can invite only candidates from one party if the contested election is a primary election. Fulani v. League of Women Voters Education Fund, 882 F.2d 621 (2d Cir. 1989). As another example, an organization can invite the major party candidates and up to four candidates who have a fifteen percent share of the vote according to a credible, independent, state-wide poll. T.A.M. 9635003 (April 19, 1996); (b) The debate topics should cover a broad range of issues in addition to those most important to the Section 501(c)(3) organization; (c) The questions presented to the candidates should be prepared by an independent, nonpartisan panel. The panel could include members of the Section 501(c)(3) organization, the media, and community leaders; (d) A neutral moderator should be selected by the sponsoring organization, and his or her role should be

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE DEBATES		
	denied sub nom. Nader v. FEC, 532 U.S. 1007 (2001). (e) Under Citizens United, in the absence of coordinated communication between the corporation and any candidate, the candidate's committee, political party committee, or any of their agents, the requirement that the debates be nonpartisan no longer applies. 2. A corporation or labor organization can contribute funds to a Section 501(c)(3) or 501(c)(4) organization to hold nonpartisan candidate debates in accordance with 11 C.F.R. §110.13. 11 C.F.R. §§114.1(a)(2)(x) and 114.4(f)(1) and (3). Under Citizens United, the requirement that the debates be nonpartisan no longer applies. 3. A nonpartisan candidate debate must have a face-to-face confrontation of at least two candidates, rather than appearances at separate times. FEC Advisory Opinion No. 1986-37. 4. An electioneering communication does not include a candidate debate or forum conducted pursuant to 11 C.F.R. §110.13, or a communication that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum. 2 U.S.C. §434(f)(3)(B)(iii); 11 C.F.R. §100.29(c)(4).	limited to ensuring that the debate ground rules are followed. The moderator should not comment on the questions or the candidates' statements in any way that indicates approval or disapproval; (e) Each candidate should have an equal opportunity to present his or her views on the issues presented; and (f) The debate should begin and end with a statement that the views presented are those of the candidates, and not of the sponsoring organization, and that the organization's sponsorship of the debate is not an endorsement of any candidate. 2. A Section 501(c)(3) organization should send the same letter of invitation to all candidates at the same time and in the same manner, e.g., overnight delivery, certified mail, or e-mail. 3. IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 10 (Nov. 2013), states that when a church or religious organization invites several candidates to speak at a forum, it should consider the following factors: ? whether questions for the candidate are prepared and presented by an independent nonpartisan panel, ? whether the topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the office sought and are of interest to the

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ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE DEBATES		
		public, ? whether each candidate is given an equal opportunity to present his or her views on the issues discussed, ? whether the candidates are asked to agree or disagree with positions, agendas, platforms or statements of the organization, and ? whether a moderator comments on the questions or otherwise implies approval or disapproval of the candidates.

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ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CANDIDATE USE OF FACILITIES AND OTHER ASSETS		
	1. A corporation can allow a candidate to use its facilities as long as it receives reimbursement at the usual and normal rental charge within a commercially reasonable time. 11 C.F.R. §§114.2(f)(2)(i)(B) and 114.9(d). If a campaign committee uses corporate telephones, the reimbursement must include, in addition to the cost of the calls, a charge for the use of the facilities. FEC Advisory Opinion No. 1995-8; FEC Advisory Opinion No. 1978-34. 2. FECA exempts from the definition of "contribution" the use of real property, including a church room used by members of the community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided in the church room for candidate or political party related activities, to the extent that the cumulative value of the invitations, food, and beverages on behalf of any single candidate does not exceed $1,000 for any single election, and on behalf of all political party committees does not exceed $2,000 in any calendar year. 2 U.S.C. §431(8)(A)-(B). 3. A corporation can allow a candidate to use its list of customers, clients, vendors, and employees to solicit contributions as long as the corporation receives advance payment for the list's fair market value. 11 C.F.R. §114.2(f)(2)(i)(C). See also FEC Advisory Opinion No. 2010-30 (nonprofit membership organization exempt from tax under Code Section 501(c)(4) can rent its e-mail subscriber list for its usual and normal charge to federal candidates and political committees; no coordinated expenditure or	1. A Section 501(c)(3) organization can allow a candidate to use its facilities as long as it makes them available to all candidates and political organizations on the same terms. The organization should charge fair market rent since by providing facilities for free or at a reduced rate the organization is likely to make an impermissible contribution. If the organization ordinarily makes its facilities available only to its members, it should not make them available to a candidate or political organization. If the organization ordinarily makes its facilities available to nonpolitical organizations, it should make them available to a candidate or political organization on the same terms (other than for free or at a reduced charge). The Section 501(c)(3) organization should also require a candidate holding an event to read a statement, both at the beginning and end of the event, that the candidate's use of its facilities is not an endorsement of the candidate by the organization. Finally, the Section 501(c)(3) organization should not advertise, promote, or provide other services with respect to a candidate's or political organization's use of its facilities. 2. IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 13 (Nov. 2013), states that in determining whether a church or religious organization engages in prohibited campaign intervention in its business transactions, such as the selling or renting of mailing lists, the leasing of office space, or the acceptance of paid political advertising, some of the factors to be considered

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	communication occurs). 4. The national committee of a political party (the Libertarian Party) can lease its self-developed mailing list to a Section 501(c)(3) or 501(c)(4) organization without the organization making a contribution to the party as long as (a) the list, or the leased portion of the list, has an ascertainable fair market value; (b) the list is leased at the usual and normal charge in a bona fide, arm's length transaction, and is used in a commercially reasonable manner consistent with the arm's length agreement; and (c) the lessee of the list, within a reasonable period of time, actually uses the names in the ordinary course of its business and in a manner consistent with the fair market price paid. In addition, the national committee can exchange its mailing lists, or portions of the lists, for lists of equal value with a Section 501(c)(3) or 501(c)(4) organization. When exchanges of equal value occur, no contribution occurs. FEC Advisory Opinion No. 2002-14. 5. An incorporated Section 501(c)(3) educational institution can make its facilities available to any candidate or political committee in the ordinary course of business and at the usual and normal charge. 11 C.F.R. §114.4(c)(7)(i). 6. A contribution or expenditure does not occur when an individual, in the course of volunteering personal services to a candidate or political party committee, obtains the use of a church or community room and provides the room to the candidate or party committee for candidate-related or party-	are: ? whether the good, service, or facility is available to the candidates on an equal basis, ? whether the good, service, or facility is available only to candidates and not to the general public, ? whether the fees charged are at the organization's customary and usual rates, and ? whether the activity is an ongoing activity of the organization or whether it is conducted only for the candidate. 3. In IRS Fact Sheet 2006-17 (Feb. 2006), the IRS provided the following example of the use of organization facilities: <u>Example 17</u>: Museum K is a section 501(c)(3) organization. It owns an historic building that has a large hall suitable for hosting dinners and receptions. For several years, Museum K has made the hall available for rent to members of the public. Standard fees are set for renting the hall based on the number of people in attendance, and a number of different organizations have rented the hall. Museum K rents the hall on a first come, first served basis. Candidate P rents Museum K's social hall for a fundraising dinner. Candidate P's campaign pays the standard fee for the dinner. Museum K is not involved in political campaign intervention as a result of renting the hall to Candidate P for use as the site of a campaign

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	related activity, provided that the room is used on a regular basis by members of the community for noncommercial purposes and the room is available for use by members of the community without regard to political affiliation. The individual's payment of a nominal fee paid to use the room is not a contribution or expenditure. 2 U.S.C. §431(8)(B)(ii); 11 C.F.R. §§100.76 and 100.136. 7. In FEC Advisory Opinion No. 2006-1, the FEC addressed whether a publisher's sales of a book at discounted prices were in-kind contributions to a PAC. A nonconnected multicandidate PAC would purchase a sizeable number of copies of a novel written by Senator Barbara Boxer at a price that was less than the publisher's suggested retail price, but was the standard price for other large purchasers. Senator Boxer would sign each book, and the PAC would offer the book to any person who raises at least $100 for the PAC within a certain time period. The purchase of the books at a discount was not an in-kind contribution by the publisher since the discounted items were made available in the ordinary course of business and on the same terms and conditions offered to the vendor's other customers that were not political committees. 8. (a) In FEC Advisory Opinion No. 2008-18, the FEC addressed whether a prohibited corporate contribution resulted from payments to federal political party committees for the provision of prescription drug discount cards to their supporters and other interested persons.	fundraising dinner. The IRS also used this example in Rev. Rul. 2007-41, Situation 17, 2007-25 I.R.B. 1421, 1425 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 1, at 14 (Nov. 2013). 4. "An IRC 501(c)(3) organization that operates a noncommercial broadcast station is not required to permit the use of its facilities by any legally qualified candidate for any public office. However, if an organization permits a legally qualified candidate for any public office to use a broadcasting station, it must give all other legally qualified candidates for that office an equal opportunity to use the broadcasting station. For these purposes, use of the broadcasting station does not include the '[a]ppearance by a legally qualified candidate on any -- (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).' 47 U.S.C. §315(a). In applying these rules, a broadcasting station is not required to invite all legally qualified candidates for a particular office to appear on the same program." 2002 CPE Text, at 377. 5. Rents for facilities should qualify for the exemption from unrelated business taxable income for rents as long as the Section 501(c)(3) organization does not provide ancillary

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	(b) Agility, Inc. maintained a prescription drug discount program, and recruited organizations to create, promote, and distribute prescription drug discount cards. Agility maintained a contractual relationship with pharmacy networks to honor the cards. MAB, a limited liability company, partnered with Agility by making the Agility prescription drug discount program available to prospective sponsors and by managing the program. (c) MAB proposed to offer the program to Democratic and Republican political party committees. MAB and Agility executed contracts with the State committees of the Republican and Democratic parties in West Virginia. These contracts contained the same terms and conditions as their contracts with nonpolitical entities, and would be signed by MAB, Agility and the party committee sponsors. As delineated in the contract signed by the West Virginia Democratic Party ("Contract"), MAB in partnership with Agility would provide the Agility Prescription Drug Discount Program to the party committee sponsor, and in turn the party committee sponsor would offer the Agility program to supporters or other interested persons. The party committee sponsor would agree to manufacture the cards, and to pay for their promotion and distribution. (d) Cardholders would be able to use the cards that party committee sponsors offered without charge to obtain discounts on drug purchases at pharmacies in participating networks. The participating pharmacy networks would pay Agility a fee, the amount of which was negotiated between	services. I.R.C. §512(b)(3). 6. (a) A Section 501(c)(3) organization can sell, lease, or license its mailing list to all candidates and political organizations on the same terms, and should charge fair market rates to the candidate or political organization. The first sale, lease, or license should not be to a candidate or political organization. In addition, the Section 501(c)(3) organization should use ordinary and prudent methods used in the direct mail fundraising industry to prevent the overuse of its mailing list or contributor list. T.A.M. 200044038 (Nov. 3, 2000). (b) A Section 501(c)(3) organization cannot provide its mailing list for free or at a reduced rate to candidates, political parties, PACs, or politically active Section 501(c)(4) organizations because the Section 501(c)(3) organization would use its assets for political purposes. (c) The 2002 CPE Text provides that a Section 501(c)(3) organization that sells or leases its mailing list to certain candidates, without making it available to all other candidates on the same terms, violates the prohibition against campaign intervention. "In determining whether the mailing list is equally available to all other candidates, it must be shown that all candidates were afforded a reasonable opportunity to acquire the list. To ensure the list is equally available to all candidates, an IRC 501(c)(3) organization should inform the candidates of the availability of the list. If the organization has never

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	Agelity and the pharmacy network, for each "transaction," or each purchase of a single medication with the card. The pharmacies would use group numbers on the cards to pay the specified transaction fees to Agelity. Agelity would pay a transaction fee of $.70 for each purchase to MAB, this fee being derived from the fee that the pharmacy networks would pay to Agelity. MAB in turn would pay a transaction fee, out of what it receives from Agelity of $.25 to the party committee sponsor. Thus, the Contract contemplated that the payments to the party committee sponsor would flow from Agelity's revenues. MAB's profit would be the difference between the fee it received and the fee it disbursed, while the party committee sponsors would earn a $.25 fee per transaction. (e) The FEC distinguished between two types of business affinity arrangements that produced different results under FECA. In the first type of arrangement, the corporation pays a fee to a political committee in exchange for the right to use a political committee asset, such as a contributor list, in conjunction with the corporation's marketing efforts, or the corporation pays a fee to a political committee to perform the service of marketing the product to the committee's supporters. The FEC has not regarded these types of arrangements as commercial transactions, but rather as fundraising devices for political committees. In these situations, the FEC concluded that the fact that the corporation receives something of value from the political committee in exchange for payments that purported to be the proceeds of a commercial sale did not change the essential	previously rented its mailing list, the value assigned to the mailing list must be given extra scrutiny to ensure that the fee charged is a fair market rate." 2002 CPE Text, at 383-84. (d) A Section 501(c)(3) organization can exchange its list for a list of new names of equal value with a candidate, political party, PAC, or politically active Section 501(c)(4) organization. The other organization should also agree to pay the fair market value for the Section 501(c)(3) organization's list if the other organization does not provide the new names within a specified time period. (e) A Section 501(c)(3) organization can accept lists from a candidate, political party, PAC, or politically active Section 501(c)(4) organization to conduct nonpartisan activities, and not to further the partisan interests of the other organization. The Section 501(c)(3) organization should not receive partisan information from the other organization, such as candidate preference identification data, lists that target specific geographical areas, or lists that identify voters who live in Democratic or Republican precincts or who support a particular candidate. 7. If a Section 501(c)(4) organization gives its mailing list to candidates, parties, or PACs, the organization makes an in-kind contribution. In jurisdictions that prohibit corporate contributions, the Section 501(c)(4) organization must sell or lease the list for fair market value. The Section 501(c)(4) organization can provide its mailing list only to

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	nature of the transaction as a contribution. The payments received by the political committees were treated as contributions subject to the prohibitions of 2 U.S.C. §441b. See, e.g., FEC Advisory Opinion Nos. 1992-40 (Leading Edge Communications), 1988-12 (Empire of America Federal Savings Bank), and 1979-17 (RNC). (f) In the second type of arrangement, a political committee pays a corporation a commercially reasonable fee in exchange for the corporation's efforts to market services that provide an opportunity for a purchaser to contribute to the political committee. In these situations, the FEC concluded that as long as: (i) the corporation and political committee enter into a commercially reasonable transaction, and (ii) the amounts contributed to political committees via rebates or rewards are from individual customers' funds and not from the corporation's funds, then the arrangements are *bona fide* commercial transactions that do not result in prohibited corporate contributions under 2 U.S.C. 441b. See, e.g., FEC Advisory Opinion Nos. 2006-34 (Working Assets), 2003-16 (Providian National Bank), and 2002-07 (Careau & Co.). (g) In the impermissible arrangements, a portion of the revenues charged and collected by a corporation were transmitted to a political committee. In the permissible arrangements, corporate funds were not paid to political committees. Accordingly, the arrangement involving MAB and Agelity was impermissible because the transaction fees payable to the political committees were from Agelity's corporate funds, and not from individual funds.	the persons and entities that it supports, and does not have to provide it to everyone that requests it. 8. In IRS Fact Sheet 2006-17 (Feb. 2006), the IRS provided the following example of the use of mailing lists: Example 18: Theater L is a section 501(c)(3) organization. It maintains a mailing list of all of its subscribers and contributors. Theater L has never rented its mailing list to a third party. Theater L is approached by the campaign committee of Candidate Q, who supports increased funding for the arts. Candidate Q's campaign committee offers to rent Theater L's mailing list for a fee that is comparable to fees charged by other similar organizations. Theater L rents its mailing list to Candidate Q's campaign committee. Theater L declines similar requests from campaign committees of other candidates. Theater L has intervened in a political campaign. The IRS also used this example in Rev. Rul. 2007-41, Situation 18, 2007-25 I.R.B. 1421, 1425 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 2, at 14 (Nov. 2013). 9. (a) The sale, exchange, or lease of mailing lists among Section 501(c)(3) organizations does not produce unrelated business taxable income. I.R.C. §513(h)(1)(B). Income from mailing list licenses to non-Section 501(c)(3) organizations should qualify for the royalty exemption from unrelated business taxable income. Income from an arrangement structured as other than a license may trigger

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	Agelity would pay MAB's transaction fee out of the revenues it would collect from the pharmacy networks, and MAB in turn would pay the party committee sponsor's transaction fee out of the fee it would collect from Agelity. While MAB was not a corporation or treated as a corporation, all the funds it provided the party committee sponsor consisted of general treasury funds from Agelity. Therefore, the political party committees participating in the program would receive corporate contributions from Agelity. (h) In addition, MAB's proposal did not involve an isolated transaction, but an ongoing enterprise. Because a political party needed only to market and distribute a card to a supporter once, but would earn a transaction fee every time that person used the card in the indefinite future, a political party could receive payments that substantially exceeded the value of the promotional and distribution services it performed.	unrelated business taxable income. I.R.C. §512(b)(2); Sierra Club, Inc. v. Commissioner, 86 F.3d 1526 (9th Cir. 1996); Common Cause v. Commissioner, 112 T.C. 332 (1999); Planned Parenthood Federation of America, Inc. v. Commissioner, 77 T.C.M. 2227 (1999). See generally Diane L. Fahey, "Taxing Nonprofits Out of Business," 62 Washington and Lee Law Review 547 (Spring 2005); Kevin M. Yamamoto, "Taxing Income From Mailing List and Affinity Card Arrangements: A Proposal," 38 San Diego Law Review 221 (Winter 2001). (b) The IRS National Office has directed EO Area Managers that "further litigation in cases with facts similar to those decided in favor of the taxpayer should not be pursued." Memorandum from the IRS National Office to EO Area Managers (Dec. 16, 1999), reprinted in 28 Exempt Organization Tax Review 141 (2000). 10. A Section 501(c)(3) organization cannot loan money to or provide loan guarantees for a candidate, political party, or PAC. This prohibition applies regardless of whether the loan bears a market interest rate. T.A.M. 9812001 (Aug. 21, 1996).

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
WEBSITE ACTIVITIES		

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
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	1. (a) A corporation cannot endorse a candidate on its Website. FEC Advisory Opinion No. 1998-22; FEC Advisory Opinion No. 1997-16. A corporation's publicly accessible Website can link to candidate Websites as long as the corporation does not normally charge nonpolitical organizations for links to their Websites. FEC Advisory Opinion No. 1999-17; FEC Advisory Opinion No. 1996-2. Under Citizens United, these opinions are no longer valid to the extent they apply to the corporation's independent expenditures. (b) The Ohio State Medical Association ("OSMA"), a Section 501(c)(6) tax-exempt membership organization under 11 C.F.R. §114.1(e)(1), made a prohibited in-kind corporate contribution when it posted to the public area of its Website links to a video recording of campaign speeches that two candidates for United States Senate from Ohio delivered to OSMA's members at is annual meeting. MUR 6552. The costs associated with OSMA making the speeches available to a broader audience constituted something of value to the candidates, which was an impermissible contribution. 2 U.S.C. §§431(8)(A)(i), 431(9)(A)(i) and 441b(a)-(b); 11 C.F.R. §114.2(a). (c) When a Section 501(c)(4) organization endorses a candidate on its Website, the costs paid by the organization are an exempt function expenditure subject to the tax regime of Code Section 527(f). See discussion of Code Section 527(f) in Paragraphs 27 and 28 of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering."	1. When a Section 501(c)(3) organization "posts something on its Website that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements, or broadcasts that favored or opposed a candidate." Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1426 (June 18, 2007). 2. A Section 501(c)(3) organization may have engaged in political activity if one part of its Website takes a position on an issue, and on a different part of its Website the organization provides neutral, unbiased information regarding the candidates' positions on that issue. Memorandum from Lois G. Lerner, Director, IRS Exempt Organizations Division, at 3 (April 17, 2008) (available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf). This position is inconsistent with Rev. Rul. 78-248, 1978-1 C.B. 154, which allows Section 501(c)(3) organizations to publish voter guides that reprint candidates' responses to a questionnaire covering a broad range of issues in a manner that does not favor any candidate. 3. "An organization has control over whether it establishes a link to another site. When an organization establishes a link to another web site, the organization is responsible for the consequences of establishing and maintaining that link, even if the organization does not have control over the content of the linked site. Because the linked content may change over time, an organization may reduce the risk of political campaign intervention by monitoring the linked

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	(d) When a Section 501(c)(4) organization endorses a candidate on a Webpage access to which is limited to its members, the organization can coordinate the material on the Webpage with candidates. 2 U.S.C. §§431(8)(B)(vi) and (9)(B)(iii) and 441b(2)(A); 11 C.F.R. §§100.134(a) and (e), 114.1(j), and 114.3(a). Access to a Webpage is limited to members if it is protected by a password given only to members, or if the organization provides a link to the Webpage in an e-mail sent only to members and the Webpage is not otherwise accessible from public portions of the organization's Website. FEC Advisory Opinion No. 2000-7 and FEC Advisory Opinion No. 1997-16. 2. An on-line Internet electronic bulletin board service provider, Compuserve, cannot provide free service to a candidate when it normally changes a fee. FEC Advisory Opinion No. 1996-2. 3. (a) In FEC Advisory Opinion No. 1999-25, the FEC found that the League of Women Voters, and the Center for Governmental Studies, two Section 501(c)(3) organizations, did not make a prohibited corporate expenditure through operation of a Website. Rather, the Website was a nonpartisan activity designed to encourage individuals to vote or register to vote under 2 U.S.C. §431(9)(B)(ii). The Website invited all ballot-qualified candidates in an election, other than a presidential general election, to participate in the Website. Using an ID and password, a candidate can enter the Website and write on any issue he or she chooses, or respond to questions from other candidates and members of	content and adjusting the links accordingly." Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1426 (June 18, 2007). 4. (a) A Section 501(c)(3) organization's Website can link to the Websites of all candidates for a public office as long as the links are presented on a consistent, neutral basis for each candidate. Rev. Rul. 2007-41, Situation 19, 2007-25 I.R.B. 1421, 1426 (June 18, 2007); IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 15 (Nov. 2013). (b) Since a Section 501(c)(3) organization can engage in lobbying and educational activities, the organization can take the position that its Website can link to a public official's government Website in furtherance of these activities. When a public official is also a candidate, the organization should state that the link is provided because of the person's position as a public official. (c) A link from a candidate's Website to a Section 501(c)(3) organization's Website should not result in impermissible campaign intervention. Since the Section 501(c)(3) organization does not control the candidate, the candidate's action should not be attributed to the Section 501(c)(3) organization. 5. A Section 501(c)(3) organization's Website can link to the Websites of a broad range of Section 527 organizations, including PACs, that provide candidate profiles and voting histories, but cannot link to the Websites of a select group

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	the public. A candidate's position on an issue is automatically entered into a "Candidate Grid," and the position is then e-mailed to his or her opponents, who can then submit statements. In addition, each candidate provides his or her biography, information on how to contact the campaign, and individual and organizational endorsements. The Website also provides an e-mail form and the candidates' addresses for viewers to communicate directly with campaigns. Campaigns may post hyperlinks to their Websites. Links are also provided to sites with reports of official campaign contribution data for candidates and ballot measures. (b) Whether an activity comes within the nonpartisan activity exception to the definition of expenditure turns on the following criteria: "the standard for inviting candidates and degree of participation by each candidate; the audience targeted; the selection of materials that come from sources other than campaigns, such as media entities; the degree of coordination between DNet [the Website] and the campaigns; and the communications of DNet itself." (c) The FEC found that the Website activities were nonpartisan because: (i) all ballot qualified candidates for an election, other than a presidential general election, were invited to participate; (ii) the space allocations and the positioning of candidates on the Candidate Grid were based on objective criteria; (iii) no effort was made to determine the political party or candidate preference of the viewers, citing 11 C.F.R. §100.8(b)(3) (now codified at 11 C.F.R. §100.133);	of Section 527 organizations and PACs. 6. (a) A Section 501(c)(3) organization's Website can link to a related Section 501(c)(4) organization's homepage that does not contain prohibited campaign intervention. The related Section 501(c)(4) organization's homepage can link to political activity in another section of its Website, and can link to the Section 501(c)(3) organization's homepage. (b) Before the 2008 election, the IRS stated in a memorandum that "at this time" it would not pursue enforcement cases in which a Section 501(c)(3) organization linked to the home page of a related Section 501(c)(4) organization. Memorandum from Lois G. Lerner, Director, IRS Exempt Organizations Division, at 3 (April 17, 2008) (available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf). It is important to note that the memorandum does not apply to links to other pages of the Website of the Section 501(c)(4) organization, and does not address whether the home page can contain candidate endorsements or other political activity. (c) The IRS found prohibited campaign intervention in the following situation. A Section 501(c)(3) organization's Website included the web pages of a related Section 501(c)(4) organization. The web pages of the related Section 501(c)(4) organization contained candidate questionnaires and endorsements of candidates for public office. The Section 501(c)(3) organization's banner, logo, site links, and disclaimer and copyright notices were placed on every page on the Section 501(c)(3)

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	and (iv) DNet did not score or rate the candidates, or make any statements expressly advocating the election or defeat of any clearly identified candidate, or the candidates of any political party. (d) Shortly after the FEC issued its advisory opinion, DNet was acquired by Grassroots.com, a for-profit nonpartisan media and technology corporation. In MUR 4998, the FEC found that the acquisition did not warrant any change to its advisory opinion because the critical factor was not the nonprofit or for-profit status of DNet's sponsor, but that the Website activities were nonpartisan. (e) Under Citizens United, this advisory opinion is no longer valid. Corporations are free to make independent expenditures of a partisan nature. 4. A limited liability company can maintain a Website that provides information on federal candidates on a nonpartisan basis, and contains hyperlinks to national party committees' Websites. FEC Advisory Opinion No. 1999-24. This opinion extends the principles of FEC Advisory Opinion No. 1999-25 (discussed in Paragraph 3 above) to for-profit companies. Under Citizens United, this advisory opinion is no longer valid. Corporations are free to make independent expenditures of a partisan nature. 5. A Section 501(c)(3) organization can use pop-up political ads in conducting a survey on the opinions of young voters on elections, and assessing the impact of the ads on the opinions.	organization's Website, including the pages from the Website of the Section 501(c)(4) organization. As a result, the Section 501(c)(3) organization violated the prohibition against campaign intervention. The fact that the Section 501(c)(4) organization reimbursed the Section 501(c)(3) organization for the proportionate cost of the Section 501(c)(3) organization's Website that contained its material did not change the result. T.A.M. 200908050 (Feb. 20, 2009). 7. (a) When a Section 501(c)(3) organization and a related Section 501(c)(4) organization maintain a joint Website, the material of the Section 501(c)(4) organization and any connected PAC containing prohibited campaign activity should be kept in a separate section accessible only from the Section 501(c)(4) areas. The Section 501(c)(3) areas should not contain links to pages that contain prohibited campaign activity, or a navigation bar that contains these links. (b) If the joint Website is owned by the Section 501(c)(3) organization, and the Section 501(c)(4) organization does not engage in political activity, the Section 501(c)(4) organization can freely post material on the Website. (c) If the joint Website is owned by the Section 501(c)(4) organization, the Section 501(c)(4) organization engages in political activity on the Website, and the Section 501(c)(3) organization pays to post material on the Website, it is unresolved whether the Section 501(c)(3) organization has

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	FEC Advisory Opinion No. 2000-16. 6. The Secretary of State of Minnesota could use its official Website to post hyperlinks to the Websites of all ballot qualified candidates for public office. FEC Advisory Opinion No. 1999-7. 7. A Section 501(c)(4) nonprofit membership organization may post candidate-prepared position papers that do not contain express advocacy on a section of its Website accessible only by its members. Since posting the position papers constitutes a permissible membership communication, any costs associated with posting the papers would not be contributions or expenditures under 2 U.S.C. §§431(9)(B)(iii) and 441b(b)(2)(A), and 11 C.F.R. §§100.134(a) and 114.1(a)(2)(x). FEC Advisory Opinion No. 2011-4. 8. (a) In FEC Advisory Opinion No. 2004-6, the FEC addressed whether a provider of an online platform to arrange candidate or political party events made a contribution or expenditure. Meetup, Inc. ("Meetup") offered a commercial, Web-based platform for arranging local gatherings on more than 1,840 topics suggested by users. Meetup listed the suggested topics for the local gatherings on Meetup.com, and its Web-based software enabled interested persons to register to meet up with others at a physical location to discuss the specified topic. Users typically hosted the "meetups" and bore all the costs associated with each event. Meetup did not supervise or arrange the events, other than to provide a platform for its users. There was no charge for Meetup's "basic services," which consisted of listing a topic on Meetup.com and	engaged in political activity. (d) If the joint Website is owned by the Section 501(c)(3) organization, and the Section 501(c)(4) organization conducts political activity on the Website, the Section 501(c)(3) organization engages in prohibited political activity by permitting its assets to be used for political activity. (e) When the Section 501(c)(4) organization conducts substantial campaign activity on its Website, the most prudent course for the Section 501(c)(3) and related Section 501(c)(4) organizations is to have separate Websites, each with a link to the other's homepage. The Section 501(c)(4) organization's homepage should not contain any prohibited campaign activity, but can provide a link to it. Cf. Treas. Reg. §1.513-4(f), Examples 11 and 12 (a hyperlink from a tax-exempt organization's Website to a sponsor's Website is a tax-free acknowledgement of the sponsor; when the tax-exempt organization endorses the sponsor's product or service on the sponsor's Website, the hyperlink is an advertisement that can trigger unrelated business taxable income to the tax-exempt organization). 8. In IRS Fact Sheet 2006-17 (Feb. 2006), the IRS provides the following examples of Website activities: Example 19: M, a section 501(c)(3) organization, maintains a web site and posts an unbiased, nonpartisan voter guide that is prepared consistent with the principles discussed in [IRS Fact Sheet 2006-17]. For each candidate

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	enabling a user to sign-up to attend a meetup. (b) Meetup derived its revenue from two sources: (i) from establishments that paid to be listed as possible event venues; and (ii) from payment for premium services to individuals and organizations. For various levels of fees, Meetup permitted entities to "sponsor" meetups on particular subjects. Meetup also listed several meetups at a given time in its "Featured Meetups" section. As a condition of sponsorship, each sponsored meetup was listed in this prominent "Featured Meetups" section for a fixed period of time, depending on the sponsorship's fee level. In exchange for a separate fee, Meetup permitted sponsors to control the text in the section of the Meetup page where the description of a meetup was located (the "What" section). The sponsors were limited to twenty words and two hyperlinks in this space. Also for a fee, sponsors could control the text that appeared in e-mails sent to members of the sponsored meetup. This text was limited to 500 characters and two links per e-mail, and each member received three to five e-mails per month. Additionally, for a fee, sponsors could choose to set the top agenda item on their Meetup Web page, which was a suggested discussion topic for the actual meetup. Meetup also provided the sponsor with the names and other data of users who indicated that they would attend the sponsored meetup and grant Meetup permission to share their information. (c) Some of the Meetup topics included the names of candidates for federal office and federal political committees.	covered in the voter guide, M includes a link to that candidate's official campaign web site. The links to the candidate web sites are presented on a consistent neutral basis for each candidate, with text saying "For more information on Candidate X, you may consult [URL]." M has not intervened in a political campaign because the links are provided for the exempt purpose of educating voters and are presented in a neutral, unbiased manner that includes all candidates for a particular office. The IRS also used this example in Rev. Rul. 2007-41, Situation 19, 2007-25 I.R.B. 1421, 1426 (June 18, 2007), but in the first bracketed language the IRS did not refer to IRS Fact Sheet 2006-17, but to Rev. Rul. 78-248. The IRS used a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 15 (Nov. 2013). <u>Example 20</u>: Hospital N, a section 501(c)(3) organization, maintains a web site that includes such information as medical staff listings, directions to Hospital N, and descriptions of its specialty health programs, major research projects, and other community outreach programs. On one page of the web site, Hospital N describes its treatment program for a particular disease. At the end of the page, it includes a section of links to other web sites entitled "More Information." These links include links to other hospitals that have treatment programs for the particular disease, research organizations seeking cures for the disease, and articles about treatment programs. This section includes a link to an article on the web site of O, a

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	A cursory review of Meetup's Website showed that the federal candidate topics comprise only a small percentage of the topic listings. Meetup did not favor or disadvantage political topics in relation to nonpolitical topics. Meetup's communications department regularly posted "Featured Meetups" about interesting or timely topics, and Meetup would only feature candidate or political committee meetup events if that candidate or committee was a paid sponsor. (d) Meetup would charge different fees to different classes of sponsors. For example, all U.S. Senate candidates would be charged one set of fees while all candidates for the U.S. House of Representatives would pay a smaller fee for the same type of services. Meetup's overall fee structure was based on a fixed set of criteria consisting of the volume of users, the geographic reach of the meetup, and how much the services would burden Meetup's resources. Thus, Meetup would provide the same services for the same fees and on the same terms and conditions to all individuals or entities who were similarly situated in accordance with Meetup's fixed criteria, regardless of whether the entities were federal candidates, political committees, businesses, or other entities in the general public. (e) Meetup would not make a contribution or expenditure under FECA solely by providing basic services without charge to federal candidates in the ordinary course of business on the same terms and conditions on which they were offered to all members of the general public. (f) Meetup would not make a contribution or expenditure	major national newspaper, praising Hospital N's treatment program for the disease. The page containing the article on O's web site contains no reference to any candidate or election and has no direct links to candidate or election information. Elsewhere on O's web site, there is a page displaying editorials that O has published. Several of the editorials endorse candidates in an election that has not yet occurred. Hospital N has not intervened in a political campaign by maintaining the link to the article on O's web site because the link is provided for the exempt purpose of educating the public about Hospital N's programs and neither the context for the link, nor the relationship between Hospital N and O, nor the arrangement of the links going from Hospital N's web site to the endorsement on O's web site indicate that Hospital N was favoring or opposing any candidate. The IRS also used this example in Rev. Rul. 2007-41, Situation 20, 2007-25 I.R.B. 1421, 1426 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 2, at 14-15 (Nov. 2013). Example 21: Church P, a section 501(c)(3) organization, maintains a web site that includes such information as biographies of its ministers, times of services, details of community outreach programs, and activities of members of its congregation. B, a member of the congregation of Church P, is running for a seat on the town council. Shortly before the election, Church P posts the following message on its web site, "Lend your support to B, your fellow parishioner, in Tuesday's election for town

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	under FECA solely by providing federal candidates and political committees with the same fixed premium services as provided to any similarly situated member of the general public, so long as it did so in the ordinary course of business for the usual and normal charge. This charge had to be set in accordance with the fixed set of criteria and had to be applied equally between the various classes of federal candidates (i.e., presidential candidates, U.S. Senate candidates, and House candidates) and other businesses or members of the general public who were similarly situated with respect to the respective classes of candidates and political committees. Finally, federal candidates and political committees had to timely pay for each premium service so that Meetup did not extend credit to a candidate or candidate's authorized committee outside the ordinary course of its business. See 11 C.F.R. §§100.55, 116.3, and 116.4. (g) The conclusion in (f) also applied to federal candidate and political committee meetups in the list of "Featured Meetups." Because federal candidates and political committee meetups would only be featured in accordance with the fixed sponsorship fee arrangement, meaning Meetup would never exercise its discretion in featuring a candidate or political committee meetup, no contribution or expenditure would result solely from Meetup's featuring of a sponsoring candidate's or political committee's meetup event. FEC Advisory Opinion No. 2004-6. 9. (a) In FEC Advisory Opinion No. 2012-22, the FEC opined that skimmerhat's web-based contribution platform would not	council." Church P has intervened in a political campaign on behalf of B. The IRS also used this example in Rev. Rul. 2007-41, Situation 21, 2007-25 I.R.B. 1421, 1426 (June 18, 2007), and IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 1, at 14 (Nov. 2013). 9. (a) When a Section 501(c)(3) organization maintains a blog, the organization should comply with the following guidelines. Since staff-written postings will be attributed to the organization, the postings should not violate the prohibition on campaign intervention. Attribution will likely occur regardless of whether the staff member writes the post on his or her own time and without using organizational resources. Rev. Rul. 2007-41, Situation 4, 2007-25 I.R.B. 1421, 1422 (June 18, 2007). (b) When a Section 501(c)(4) organization maintains a blog, staff postings do not have to comply with the prohibition on campaign intervention, but must comply with applicable federal and state campaign finance laws. Staff of a related Section 501(c)(3) organization can post on the Section 501(c)(4) organization's blog as long as the two organizations have a written cost-sharing agreement under which the Section 501(c)(4) organization pays for the Section 501(c)(3) staff's time. (c) It is unresolved how the IRS will treat guest bloggers on a Section 501(c)(3) organization's blog. If the IRS treats the blog as a public forum, the posts of guest bloggers should not be attributed to the organization as

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	result in prohibited in-kind corporate contributions. (b) Visitors and registered members of the site ("users") will be able to use the skimmerhat platform to search for federal candidates using any of three primary search criteria: geographic location, ideological similarities, or single-issue positions. (c) Utilizing the geographic location feature, users will be presented with a map of the United States and will be able to search for federal candidates by location. As a user pinpoints the location of a race in which he or she is interested, candidates will be listed, along with their political party, as either "incumbents" or "challengers." If available, photographs of candidates will also be displayed. Also listed at this level is his or her "popularity" among members of the site. (d) Users may also search for candidates with whom they are ideologically similar by taking a "candidate matching survey," which poses a series of "yes/no" ideological questions to users. These answers are then compared to the positions of all federal candidates. A list of candidates is then displayed on the results page, ranked from highest to lowest, based upon the matching percentage with the user. (e) Users can search for candidates based on their position on a single issue. Using skimmerhat's list of political issues, a user can find any candidate that matches the user's position on an individual issue.	long as the organization posts a disclaimer stating that the views expressed are only those of the guest bloggers and not the organization, that the organization does not support or oppose any candidate, and that the postings are provided as a public service in the interest of informing the public. See Rev. Rul. 86-95, 1986-2 C.B. 73 (rules for candidate debates) (discussed in Paragraph 1 of the I.R.C. column for "Candidate Debates"); Rev. Rul. 74-574, 1974-2 C.B. 160 (provision by broadcasting station of Section 501(c)(3) organization of free air time to candidates) (discussed in Paragraph 2 of the I.R.C. column for "Candidate Appearances and Advertisements"); Rev. Rul. 72-513, 1972-2 C.B. 246 (provision by university of facilities and faculty advisors to a student newspaper) (discussed in Paragraph 8(c) of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering"). (d) The IRS may not necessarily take the position described in subparagraph (c). The IRS has stated that when a Section 501(c)(3) organization "posts something on its Website that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements, or broadcasts that favored or opposed a candidate." Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1426 (June 18, 2007). Under this reasoning, the IRS can attribute the postings of guest bloggers to the Section 501(c)(3) organization. (e) If the Section 501(c)(3) organization invites guest

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	(f) Once matched with federal candidates, users will be directed to a "candidate page" that is hosted on the site. Every federal candidate will have his or her own candidate page, which will include a photo, biographical information, campaign finance information, recent updates, and issue positions. Each candidate page will also feature an electronic contribution form, which provides users with a way to make contributions to the federal candidates with whom they are matched. Contributions will be limited to $2,500. (g) skimmerhat will assess an eight percent "processing and convenience" fee per transaction, which will cover credit card processing and provide a profit to the company. This eight percent convenience fee will be applied, in a separate field, in addition to the contribution amount. Once the user accepts the transaction, contributions will be routed to skimmerhat's merchant account, and the eight percent fee will be directed to the company's separate business account. No funds will be commingled in skimmerhat's corporate treasury account. All disbursements of funds will be taken directly from skimmerhat's merchant account, and not from the company's corporate treasury account. Contributions will be forwarded to candidate campaigns. (h) skimmerhat will provide candidates with the option of assuming limited managerial control over basic biographical information on their candidate pages, as well as setting positions on issues. (i) skimmerhat proposes to transmit contributions to political	bloggers from only one side of an issue that the organization favors, the IRS may treat the blogger as the organization's agent. If the guest blogger posts statements in support or opposition to a candidate, the IRS likely will find impermissible campaign intervention. (f) A Section 501(c)(3) organization can use its blog as a forum for a candidate debate as long as the organization satisfies the following requirements: (i) the organization invites all legally qualified candidates for the contested office; (ii) the organization's Website contains a prominent disclaimer that the views expressed are only those of the candidates and not those of the organization, that the organization does not support or oppose any candidate, and that the postings are provided as a public service in the interest of informing the public; (iii) the organization presents the blog posts in a neutral manner, and the questions and the format for the answers do not favor any candidate; and (iv) the blog posts address a broad range of issues in addition to those most important to the organization. (g) Comments from the general public on a blog maintained by a Section 501(c)(3) organization should not be attributed to the organization as long as the organization allows comments to be posted regardless of political viewpoint, and the organization posts a disclaimer stating that the views expressed are only those of the persons posting the comments and not those of the organization, that the organization does not support or oppose any

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	committees without receiving payment from political committees. The FEC has previously concluded that companies that process contributions to political committees as a service to the political committees must be compensated for those services to avoid making in-kind contributions. See FEC Advisory Opinion No. 2007-4 (Atlatl). Companies that process contributions as a service to contributors do not need to be compensated for these services by the recipient political committees because the companies are not providing any services or anything of value to the recipient political committees. See, e.g., FEC Advisory Opinion No. 2011-19 (GivingSphere). (j) Users will make contributions to candidates from skimmerhat's Website, rather from the candidates' own Websites, and otherwise irrespective of candidate involvement with skimmerhat's candidate pages. Further, upon agreeing to skimmerhat's terms of service, skimmerhat will transmit users' funds only at the request of its users, not pursuant to negotiated agreements with political committees. Compare FEC Advisory Opinion 2011-19 (GivingSphere) (hosting a database and Website through which customers identify recipients and transmit funds) with FEC Advisory Opinion No. 2007-4 (Atlatl) (proposing only to process online credit card contributions initiated on political committees' Websites). Accordingly, skimmerhat's operation will not result in a prohibited in-kind corporate contributions. (k) The FEC also opined that skimmerhat's processing and	candidate, and that the postings are provided as a public service in the interest of informing the public. Alternatively, the organization can delete all comments that refer to a candidate or political party. See generally Allen Mattison, "Friends, Tweets, and Links: IRS Treatment of Social Media Activities by Section 501(c)(3) Organizations," 67 Exempt Organization Tax Review 445 (May 2011). 10. (a) When a Section 501(c)(3) organization or Section 501(c)(4) organization moderates a listserve, for federal elections and elections in states that do not treat communications with members as contributions, the analysis turns on whether the listserve is open only to members, or is also open to the public. (b) For listserves moderated by a Section 501(c)(3) organization that are open only to members, staff members should not make posts that support or oppose candidates. The organization can take the position that posts by members that support or oppose candidates are permissible as long as the organization permits posts regardless of political viewpoint, and posts a disclaimer and periodically sends list members a disclaimer stating that the views expressed are only those of the members making the posts and not the organization, that the organization does not support or oppose any candidate, and that the postings are provided as a service in the interest of informing the membership. (c) For listserves moderated by a Section 501(c)(3)

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	convenience fee of eight percent will not count towards a user's individual contribution limits to a candidate. The FEC has distinguished between situations in which a company provides services to recipient political committees, and situations which in a company provides services to its customers. In FEC Advisory Opinion No. 2007-4 (Atlatl), the contractual relationship was between the company that processed the contributions and the recipient political committee. The FEC concluded that the amount of contributions to political committees must include the fees paid by contributors to the company. In contrast, in FEC Advisory Opinion No. 2011-6 (Democracy Engine), the FEC concluded that the amount of the contributions would not include the processing fees paid by contributors, because the services provided by the vendor were "at the request and for the benefit of the contributors, not of the recipient political committees." Thus, fees paid for those services did not "relieve the recipient political committees of a financial burden they would otherwise have had to pay for themselves," and were not contributions to the recipient political committees. FEC Advisory Opinion No. 2011-6 (Democracy Engine). (l) Since skimmerhat will provide its services at the request of and for the benefit of its customers, and not the recipient political committees, the payment of the convenience fee by the users will not constitute a contribution by the users to any recipient political committee. (m) The FEC also opined that skimmerhat may provide the	organization that are open to the public, staff members should not make posts that support or oppose candidates. The organization should post a disclaimer and periodically send list members a disclaimer stating that the organization does not support or oppose any candidate, and that participants in the listserve should not make posts that support or oppose any candidate. (d) For listserves moderated by a Section 501(c)(4) organization that are open only to members, the organization's staff members and members can freely make posts that support or oppose candidates, and can coordinate their posts with candidates. (e) For listserves moderated by a Section 501(c)(4) organization that are open to the public, staff members can make posts that support or oppose candidates as long as they are independent expenditures or permissible in-kind corporate contributions. Participants from the public can make posts that support or oppose candidates as long as the listserve expenses are independent expenditures or are allocated as in-kind contributions to the candidate. In addition, the organization can take the position that the postings are permissible as long as the organization posts a disclaimer and periodically sends list members a disclaimer stating that the views expressed are only those of the participants in the listserve and not the organization. (f) For elections in states that treat communications with members as in-kind contributions, the rules for listserves open to members of the public discussed above also apply

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	factual information about federal candidates to its users as proposed. The information will supplement the overall service offered by the site. skimmerhat's proposal is similar to the one approved in FEC Advisory Opinion No. 2011-19 (GivingSphere), in which a corporation wished to provide basic factual information about candidates to its customers for use in determining to whom to make contributions through the corporation's web platform. (n) The FEC also opined that skimmerhat may grant candidates the option of assuming limited managerial control over basic biographical information on their candidate pages, as well as setting positions on issues. These actions would not result in skimmerhat making a prohibited in-kind corporate contribution. skimmerhat represented that the purpose of allowing candidates to make these changes to their profiles is to increase the accuracy of the site's data and the effectiveness of the skimmerhat matching process, both of which advance skimmerhat's commercial interests.	in this situation. See generally Allen Mattison, "Friends, Tweets, and Links: IRS Treatment of Social Media Activities by Section 501(c)(3) Organizations," 67 Exempt Organization Tax Review 445 (May 2011). 11. (a) Current IRS guidance does not address dynamic situations in which Web servers can access local databases of information, and can execute software that connects to other Web servers and requests content and then aggregates the content to create dynamic pages that are customized for each individual user. (b) For example, a Section 501(c)(3) organization's Website contains a link to the Website of a news organization that posts articles of importance to the organization's exempt function. Section 501(c)(3) organization members who live in New York and link to the news organization's Website are directed to pages that contain advertisements for consumer products. Section 501(c)(3) members who live in California, which is in the middle of a hotly contested gubernatorial primary, and link to the news organization's Website are directed to pages that contain advertisements for consumer products and for one of the candidates. (c) As another example, a Section 501(c)(3) organization that raises money to fund research and conduct education for a particular disease purchases an online advertisement service from Google. The organization provides a set of images with corporate logos and links to its Website, and selects keywords such as "prevention," "symptoms," and

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		"treatment regimen." Google uses the keywords to make the advertisements appear on search result pages on its search engine, and also employs contextual targeting. Contextual targeting places advertisements on a third-party's Webpage. Using contextual targeting, Google places an advertisement on a Webpage that contains an oped article in a major newspaper attacking a candidate's position on funding medical research supported by the organization. (d) A Section 501(c)(3) organization that links to other Websites should periodically review the pages on the other Websites for content that may constitute impermissible campaign intervention. The organization should also review the other Websites' home pages. If the organization has concerns about a Website, it should consider contacting the Website's owner and obtaining permission to replicate the pertinent pages on the organization's Website without the content that constitutes campaign intervention. In addition, the organization should document its review through screen shots. (e) When a Section 501(c)(3) organization contracts for dynamic content from a third-party, the contract should contain provisions for the third-party to filter out inappropriate content. See generally Nelson S. DaCunha, "Safe Linking For Section 501(c)(3) Organizations," 20 Taxation of Exempts 26 (May/June 2009). 12. (a) A Section 501(c)(3) organization should not "friend" or "like" a candidate on Facebook since the action shows a

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		preference for the candidate. (b) It is unresolved whether a Section 501(c)(3) organization can follow a candidate on Twitter. Following does not necessarily mean that the organization supports the candidate; rather the organization may follow the candidate for informational purposes. In this situation, the organization should follow all candidates for the same office. Nevertheless, the IRS can take the position that following all candidates is not neutral because visitors to the organization's Twitter site will not see that the organization follows all candidates. Only a certain number of accounts that a user follows are visible to visitors on a user's Twitter page, and the user does not control which accounts appear at any particular time. (c) It is also unresolved whether a Section 501(c)(3) organization can "friend" or "like" a public official on Facebook. The organization can take the position that it is engaging in lobbying or educational activities, rather than supporting the official's candidacy. If the public official's Facebook page shows visitors only that the Section 501(c)(3) organization likes or is friends with the official, and without any explanation that it is the official government page that the organization likes or is friends with, the IRS can take the position that the organization has engaged in impermissible campaign intervention. In addition, if the organization takes the actions close to an election, the IRS can take the position that impermissible campaign intervention has occurred.

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		(d) A Section 501(c)(4) organization can "friend" or "like" any candidate on Facebook. The expense will either be an independent expenditure or an in-kind contribution. (e) When a candidate likes a Section 501(c)(3) organization on Facebook, the candidate's action should not result in campaign intervention by the Section 501(c)(3) organization. Since the Section 501(c)(3) organization does not control the candidate, the candidate's action should not be attributed to the Section 501(c)(3) organization. 13. (a) When a candidate or public official requests to "friend" a Section 501(c)(3) organization on Facebook, or to "follow" a Section 501(c)(3) organization on Twitter, if the organization's policy is to accept all requests, the organization should accept the candidate's or public official's request. (b) When a candidate posts a political message on the Facebook wall of a Section 501(c)(3) organization, the organization can respond in one of three ways. First, the organization can delete the message. Second, the organization can post a follow-up stating that the posts of others on the wall do not represent the views of the organization, and that the organization does not support or oppose candidates. Third, the organization can place a disclaimer on its Facebook wall or information page that the organization does not support or oppose any candidate, and requesting that visitors do not post comments on any

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		candidate or party. Furthermore, the organization should take a consistent approach for all postings regardless of their content. If the organization were to delete the posts of candidates that are critical of the organization, and post a follow-up for candidates that support the organization, the IRS would likely find impermissible campaign intervention. (c) When a public official uses his or her official government account to post a message, or when a legislator uses his or her campaign account to post an issue-oriented message that does not seek support in an election, the Section 501(c)(3) organization can take the position that the discussion is educational and focused on issues. In this situation, no campaign intervention has occurred.

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

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CAMPAIGN ACTIVITIES OF SECTION 501(c)(3) ORGANIZATION'S DIRECTORS, OFFICERS, AND EMPLOYEES		
	1. A corporation cannot compensate an employee while working on a campaign, other than compensation for bona fide earned vacation or leave. 11 C.F.R. §100.54(c); FEC Advisory Opinion No. 2000-1; FEC Advisory Opinion No. 1976-70. 2. When an employee takes unpaid leave to work on a campaign, a corporation cannot continue to pay for the employee's benefits unless the corporation has a general policy to provide benefits for a brief period (i.e., thirty-one days) after termination of employment. The employee can pay for the benefits from personal funds. 11 C.F.R. §114.12(c)(1); FEC Advisory Opinion No. 1992-3; FEC Advisory Opinion No. 1976-70. A corporate PAC can pay the employer's share of the cost of benefits, and the payment is an in-kind contribution to the candidate. 3. A corporation can grant service credit for leave without pay if the corporation normally provides identical treatment to employees who take leave without pay for nonpolitical purposes. 11 C.F.R. §114.12(c)(2). 4. An employee who is expected to work a specified number of hours per week can engage in campaign activity during working hours if the employee makes up the lost work time, or completes his or her work within a reasonable time. If the corporation compensates the employee on a commission or piecework basis, the employee's time is considered his or her own because the corporation compensates the employee only	1. Directors, officers, and employees of a Section 501(c)(3) organization can participate in campaigns in their individual capacities as long as they do not use the organization's resources, or act as the organization's agents. The Section 501(c)(3) organization should: (a) publish written guidelines in its employee manual, and redistribute the guidelines at the beginning of each election cycle; (b) require employees who wish to participate in campaign activities during normal working hours to take vacation time or leave without pay; (c) prohibit employees from using the organization's letterhead in campaign activities; (d) prohibit employees from displaying support of or opposition to a candidate at its offices, such as hanging posters and distributing campaign literature and videos; and (e) prohibit employees from using the organization's support services for campaign activities, such as computer, duplicating, e-mail, facsimile, messenger, and telephone, unless the organization otherwise permits personal use with prompt reimbursement. For example, the organization can require an employee to use a personal cellular phone for campaign activities conducted on personal time (e.g., lunch hour) at the organization's

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CAMPAIGN ACTIVITIES OF SECTION 501(c)(3) ORGANIZATION'S DIRECTORS, OFFICERS, AND EMPLOYEES		
	for work actually performed. 11 C.F.R. §100.54(a)-(b); see also FEC Advisory Opinion No. 2004-17 (candidate for House of Representatives can provide part-time consulting services to a law firm and receive hourly compensation; compensation paid by law firm was not a contribution because the law firm paid the compensation irrespective of the candidacy under 11 C.F.R. §113.1(g)(6)). 5. A corporation cannot reimburse an employee through a bonus, expense account, and any other form of compensation for the employee's campaign contributions. 11 C.F.R. §114.4(b)(1). 6. (a) In FEC Advisory Opinion No. 2004-8, the FEC addressed whether a corporation's payment of severance pay to an executive who terminated employment to become a candidate for the House of Representatives is a prohibited contribution. The applicable rule is that a third-party's payment of a candidate's expenses that are "personal use" expenses under 2 U.S.C. §439a(b)(2) is a contribution by the third-party unless the payment would have been made "irrespective of the candidacy." 11 C.F.R. §113.1(g)(6). The payment of employment-related compensation is a contribution unless (i) the compensation results from bona fide employment that is genuinely independent of the candidacy; (ii) the compensation is exclusively in consideration of services provided by the employee as a part of this employment; and (iii) the compensation does not exceed the amount of compensation that would be paid to any other similarly	offices. G.C.M. 39,414 (Sept. 25, 1985). 2. A Section 501(c)(3) organization cannot coordinate its employees' activities to enable them to attend political events, such as fundraisers, and vote for candidates taking positions favorable to the organization. Rev. Rul. 67-71, 1967-1 C.B. 125; G.C.M. 39,811 (Feb. 9, 1990). 3. (a) The 2002 CPE Text contains the following discussion of attribution of the acts of individual officials to a Section 501(c)(3) organization: "Officials acting in their individual capacity may be identified as officials of the organization so long as they make it clear that they are acting in their individual capacity, that they are not acting on behalf of the organization, and that their association with the organization is given for identification purposes only. If it is not made clear that the official's association with the organization is given only for purposes of identification, the individual's acts may be attributed to the IRC 501(c)(3) organization since the organization typically acts through its officials. Actions and communications by the officials of the organization that are of the same character and method as authorized acts and communications of the organization will be attributed to the organization. Therefore, when an official of an IRC 501(c)(3) organization endorses a candidate somewhere other than in the organization's publications or at its official functions, and the organization is mentioned, it should be made clear that such endorsement is being made

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	qualified person for the same work over the same period of time. 11 C.F.R. §113.1(g)(6)(iii)(A)-(C). (b) The American Sugar Cane League ("ASCL"), a Louisiana nonprofit corporation, proposed a severance package for its President and General Manager of approximately eleven years of full salary of six months to a year with the continuation of health insurance coverage for the same term. The factors that ASCL historically used in deciding whether to grant a severance package, and the size of the package were (i) the position held; (ii) the length of time employed; and (iii) an evaluation of job performance. (c) The severance package satisfied the first and second prongs of the exception to contribution status because ASCL had a regular business practice of providing severance packages to departing long-term executives and employees. Four of seven employees who terminated employment since the severance policy was instituted in 1987 received a severance package, and ASCL used relatively objective factors in deciding whether to offer a severance package. The package satisfied the third prong because certain board members in 2001, and the full board in 2004, considered the President's tenure and service, and determined that his employment with ASCL was most comparable to the most recently departed executive, a former vice-president with twenty-four years of service. The vice-president received one year of pay and a full panoply of benefits: one year of health benefits coverage, his company-owned computer, the option	by the individual in his or her private capacity and not on the organization's behalf. The following language would serve as a sufficient disclaimer: 'Organization shown for identification purposes only; no endorsement by the organization is implied."' 2002 CPE Text, at 364. The position of the 2002 CPE Text potentially conflicts with Example 2 in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 7 (Nov. 2013) (discussed in Paragraph 7 below). See also T.A.M. 200446033 (Nov. 2, 2004) ("[W]hen officials of a section 501(c)(3) organization engage in political activity at official functions of the organization or through the organizations' official publications, the actions of the officials are attributed to the section 501(c)(3) organization. Use of the section 501(c)(3) organization's financial resources, facilities or personnel is also indicative that the actions of the individual should be attributed to the organization."). (b) In Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422-23 (June 18, 2007), the IRS, in its discussion of individual activity by organization leaders, deleted the following language found in Fact Sheet 2006-17 (Feb. 2006): "To avoid potential attribution of their comments outside of organization functions and publications, organization leaders who speak or write in their individual capacity are encouraged to clearly indicate that their comments are personal and not intended to represent the views of the organization." The IRS also used similar language in IRS

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	of purchasing his company-owned car for Blue Book value, and payment for his previously scheduled speaking engagement trip to Australia. The fact that the President was not offered the full range of benefits provided the vice-president was reflective of his shorter eleven year tenure. Finally, given the nature of organizations as small as ASCL, the lack of a written severance policy and the existence of some Board discretion in determining the size and scope of a severance package were not fatal to the conclusion that the package was compensation "irrespective of the candidacy." Finally, the fact that a severance package of similar size to the current proposal was discussed with influential board members in 2001 when there was no prospect of the President's future status as a federal candidate was additional evidence that ASCL's proposed package was compensation "irrespective of the candidacy." See also FEC Advisory Opinion No. 2011-27 (Section 501(c)(3) organization's severance payment of three months salary to former executive director who was a candidate for U.S. House of Representatives was not a prohibited corporate contribution; organization would have made severance payment irrespective of candidacy; since 2007 organization provided severance packages to employees who were terminated involuntarily other than termination due to lost grant funding; former executive director received the same three month package that all other departing senior managers received); FEC Advisory Opinion No. 2006-13 (equity partner of law firm became a candidate for at-large seat in House of Representatives from Delaware; law firm's compensation	Publication 1828, Tax Guide for Churches and Religious Organizations, at 7 (Nov. 2013). (c) The officials of a Section 501(c)(3) organization should not conduct campaign activities (i) on stationery containing the letterhead of the organization or signed by the organization's officials in an official capacity; (ii) in the organization's publications, Websites, mass media advertisements, and programs produced by the organization; and (iii) at the organization's official events. 4. The 2002 CPE Text takes the following position on FEC Advisory Opinion No. 1984-12 (see discussion of this Advisory Opinion in Paragraph 7 of the FECA column): "The prohibition against political campaign activity does not prevent an organization's officials from being involved in a political campaign, so long as those officials do not in any way utilize the organization's financial resources, facilities, or personnel, and clearly and unambiguously indicate that the actions taken or the statements made are those of the individuals and not of the organization. Whether the individuals are truly acting in their own capacity is an evidentiary question. Unfavorable evidence would include any similarity of name between the IRC 501(c)(3) organization and the PAC, any excessive overlap of directors without a convincing explanation for the situation, and any sharing of facilities." 2002 CPE Text, at 366.

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	plan is a hybrid formula that takes into account: (i) historical productivity levels of each equity partner; (ii) each equity partner's participation in firm leadership and marketing that is not recognized in the productivity calculations; and (iii) each equity partner's role in generating revenue of the firm in the current year by originating and servicing clients during the year; so long as candidate is compensated in accordance with the firm's compensation plan, his compensation will satisfy the three criteria in 11 C.F.R. §113.1(g)(6)(iii); although compensation under (i) for the candidate will not be reduced during 2006 because of any reduced productivity in 2006, this type of compensation will be affected by the candidate's reduced 2006 productivity if he remains with the firm when compensation under (i) is reset in January 2007 for the next two year period); FEC Advisory Opinion No. 2000-1 (paid leave of half salary while employee is a candidate granted solely in employer's discretion is a prohibited corporate contribution). 7. Directors of a Section 501(c)(3) organization can establish a PAC in their individual capacities and unconnected to the organization. FEC Advisory Opinion No. 1984-12. In this Advisory Opinion, members of the board of directors of the American College of Allergists, Inc., a Section 501(c)(3) organization, decided to form, in their individual capacities, a PAC, the Independent Allergists Political Action Committee. In finding this activity to be permissible, the FEC gave the following admonition: "The Act and regulations also preclude a corporation from providing any indirect	5. For individuals other than a Section 501(c)(3) organization's officials, such as employees and members, their actions are attributed to the organization when there is real or apparent authorization by the organization. In general, principles of agency apply in making this determination, and the "actions of employees within the context of their employment generally will be considered to be authorized by the organization. Acts of individuals that are not authorized by the IRC 501(c)(3) organization may be attributed to the organization if it explicitly or implicitly ratifies the actions. A failure to disavow the actions of individuals under apparent authorization from the IRC 501(c)(3) organization may be considered a ratification of the actions. To be effective, the disavowal must be made in a timely manner equal to the original actions. The organization must also take steps to ensure that such unauthorized actions do not recur. . . . For example, in G.C.M. 39,414 (Feb. 29, 1984), the political campaign activities of individual members were attributed to an IRC 501(c)(3) organization. The organization's publication stated that the organization would be sending members to work on the campaign, members identified themselves as representing the organization, and officials made no effort to prevent the members' activities." 2002 CPE Text, at 365; see also PLR 200151060. 6. IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 7 (Nov. 2013), contains the following example of a religious leader acting individually

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	contribution of anything of value to a nonconnected political committee. This requirement prohibits the College from engaging in conduct which favors or appears to favor IAPAC's solicitation activity. For example, it would be improper for the College to allow IAPAC to use its letterhead for solicitation and administrative purposes. It would also be improper for the College to charge IAPAC less than the normal and usual rate, as determined by the market price, for use of its membership list or to provide such list to IAPAC on an exclusive basis. Finally, neither the College nor IAPAC may assert a proprietary interest in control over use of the name Independent Allergists Political Action Committee, IAPAC, or the words 'Allergist' or 'Allergists' in the event another political committee were to adopt a similar name, or acronym, in whole or in part." See discussion of the IRS position on this Advisory Opinion in Paragraph 4 of the I.R.C. column. 8. In FEC Advisory Opinion No. 2007-10, the FEC addressed an employee's use of corporate assets. The principal campaign committee of Representative Silvestre Reyes planned to host a golf-tournament fundraiser in which individuals or political action committees sponsored each of eighteen holes. The campaign committee planned to recognize each sponsor at its hole. For individual contributors, the campaign committee would recognize the individual's corporate employer with a sign stating, "Hole sponsored by [Individual] [Title] of [Corporation's Name, Trademark, or Service Mark]." The individual would pay for	and not on behalf of the religious organization: <u>Example 1</u>: Minister A is the minister of Church J, a section 501(c)(3) organization, and is well known in the community. With their permission, Candidate T publishes a full-page ad in the local newspaper listing five prominent ministers who have personally endorsed Candidate T, including Minister A. Minister A is identified in the ad as the minister of Church J. The ad states, 'Titles and affiliations of each individual are provided for identification purposes only.' The ad is paid for by Candidate T's campaign committee. Since the ad was not paid for by Church J, and the endorsement is made by Minister A in a personal capacity, the ad does not constitute campaign intervention by Church J. It is important to note that the IRS did not require other persons who were not religious leaders to provide endorsements in the ad. The IRS used a similar example in IRS Fact Sheet 2006-17, Example 3 (Feb. 2006), and Rev. Rul. 2007-41, Situation 3, 2007-25 I.R.B. 1421, 1422 (June 18, 2007). 7. IRS Publication 1828, Tax Guide for Churches and Religious Organizations, at 7 (Nov. 2013), contains the following example of a minister acting in his individual capacity: <u>Example 2</u>: Minister B is the minister of Church K, a section 501(c)(3) organization, and is well known in the

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	the sponsorship, and the individual's employer would not reimburse him or her. The FEC opined that the campaign committee could not recognize the corporate employers. Neither a corporation nor its agents can use the corporation's names, trademarks, or service marks to facilitate the making of contributions to a federal political committee, and a federal political committee cannot knowingly accept or receive facilitated contributions. 11 C.F.R. §114.2(d)-(f)(1) and (4). FEC Advisory Opinion No. 2007-10. 9. The FEC has found that when corporate executives use corporate stationery without reimbursing the corporation, the corporation makes an impermissible contribution. MUR 3066, 1690, and 1261. Under Citizens United, this position is no longer valid to the extent it applies to independent expenditures. 10. (a) Employees and shareholders of a corporation can make "occasional, isolated, or incidental use" of corporate facilities and equipment for volunteer campaign activity. This use means that the individual's use during regular work hours does not prevent him or her from completing the normal amount of work. For example, employees and shareholders can use office phones to organize a campaign event on an incidental basis. The regulations provide a safe harbor for activity that does not exceed one hour per week or four hours per month. 11 C.F.R. §114.9(a)(1)-(2)(i). (b) An employee's or shareholder's voluntary individual	community. Three weeks before the election, he attends a press conference at Candidate V's campaign headquarters and states that Candidate V should be reelected. Minister B does not say he is speaking on behalf of Church K. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church K. Because Minister B did not make the endorsement at an official church function, in an official church publication or otherwise use the church's assets, and did not state that he was speaking as a representative of Church K, his actions do not constitute campaign intervention attributable to Church K. The IRS also used this example in IRS Fact Sheet 2006-17, Example 5 (Feb. 2006), and Rev. Rul. 2007-41, Situation 5, 2007-25 I.R.B. 1421, 1422 (June 18, 2007). It is important to note that the IRS did not require the minister to issue a disclaimer that the church does not endorse any party or candidate, and that the minister's affiliation with the church is for identification purposes only. The position of these examples potentially conflicts with the 2002 CPE Text (discussed in Paragraph 3(a) above). 8. In Fact Sheet 2006-17 (Feb. 2006), the IRS provides the following examples of individual activity by organization leaders: Example 3: President A is the Chief Executive Officer of Hospital J, a section 501(c)(3) organization, and is well

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	Internet activity (as defined in 11 C.F.R. §100.94 and set forth in Paragraph 11) on the employer's computer equipment in excess of one hour a week or four hours a month and regardless of whether the activity is during or after normal work hours is still treated as occasional, isolated, or incidental use as long as: (i) the employee completes the normal amount of ordinarily expected work; (ii) the use does not increase the corporation's overhead or operating costs; and (iii) the activity is not performed under coercion by the employer. 11 C.F.R. §114.9(a)(2)(ii). (c) Outside of occasional, isolated, or incidental use, employees and shareholders can use corporate facilities and equipment during or outside regular work hours for volunteer campaign activity as long as: (i) the corporation does not condition the availability of the facilities or equipment on its use for campaign activity or in support of or opposition to any candidate or party; and (ii) the employee or shareholder reimburses the corporation to the extent that the corporation's overhead or operating costs are increased. The employee's or shareholder's reimbursement is an in-kind contribution to the candidate who benefits from the employee's or shareholder's volunteer work. 11 C.F.R. §114.9(a)(1) and (3). 11. (a) When an individual or a group of individuals, acting independently or in coordination with any candidate, authorized committee, or political party committee, engages in Internet activities for the purpose of influencing a federal election, neither of the following is a contribution or	known in the community. With the permission of five prominent healthcare industry leaders, including President A, who have personally endorsed Candidate T, Candidate T publishes a full page ad in the local newspaper listing the names of the five leaders. President A is identified in the ad as the CEO of Hospital J. The ad states, "Titles and affiliations of each individual are provided for identification purposes only." The ad is paid for by Candidate T's campaign committee. Because the ad was not paid for by Hospital J, the ad is not otherwise in an official publication of Hospital J, and the endorsement is made by President A in a personal capacity, the ad does not constitute campaign intervention by Hospital J. The IRS also used this example in Rev. Rul. 2007-41, Situation 3, 2007-25 I.R.B. 1421, 1422 (June 18, 2007). Example 4: President B is the president of University K, a section 501(c)(3) organization. University K publishes a monthly alumni newsletter that is distributed to all alumni of the university. In each issue, President B has a column titled "My Views." The month before the election, President B states in the "My Views" column, "It is my personal opinion that Candidate U should be reelected." For that one issue, President B pays from this personal funds the portion of the cost of the newsletter attributable to the "My Views" column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the university. Because the endorsement appeared in an official publication of University K, it

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	expenditure by that individual or group of individuals: (i) the individual's uncompensated personal services related to such Internet activities; or (ii) the individual's use of equipment or services for uncompensated Internet activities regardless of who owns the equipment and services. (b) The term "Internet activities" includes, but is not limited to: sending or forwarding electronic messages; providing a hyperlink or other direct access to another person's Website; blogging; creating, maintaining, or hosting a Website; paying a nominal fee for the use of another person's Website; and other forms of communication distributed over the Internet. (c) Equipment and services include, but are not limited to: computers, software, Internet domain names, Internet Service Provider (ISP), and any other technology that is used to provide access to or use of the Internet. (d) Paragraph 11(a) also applies to any corporation that is wholly owned by one or more individuals, that engages primarily in Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities. Under Citizens United, in the absence of coordinated communications, corporations are free to engage in partisan Internet activities regardless of the number or identity of the corporation's shareholders. One potential limitation on corporate Internet activity is for corporations organized under foreign law, or controlled by foreign persons or entities.	constitutes campaign intervention by University K. The IRS also used this example in Rev. Rul. 2007-41, Situation 4, 2007-25 I.R.B. 1421, 1422 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 3, at 8 (Nov. 2013). Example 6: Chairman D is the chairman of the Board of Directors of M, a section 501(c)(3) organization that educates the public on conservation issues. During a regular meeting of M shortly before the election, Chairman D spoke on a number of issues, including the importance of voting in the upcoming election, and concluding by stating, "It is important that you all do your duty in the election and vote for Candidate W." Because Chairman D's remarks indicating support for Candidate W were made during an official organization meeting, they constitute political campaign intervention by M. The IRS also used this example in Rev. Rul. 2007-41, Situation 6, 2007-25 I.R.B. 1421, 1423 (June 18, 2007), and a similar example in IRS Publication 1828, Tax Guide for Churches and Religious Organizations, Example 4, at 8 (Nov. 2013). 9. When a church owns the house in which its minister lives, can the minister place a placard supporting a candidate on the front lawn, or conduct campaign activities from the house? Does it make a difference if the minister pays fair market rent for the house to the church? Similarly, when a church retains title to the automobile used by its minister

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	(e) The following payments are not exempt from the definition of contribution or expenditure: (i) any payment for a public communication (as defined in 11 C.F.R. §100.26) other than a nominal fee; or (ii) any payment for the purchase or rental of an e-mail address list made at the direction of a political committee; or (iii) any payment for an e-mail address list that is transferred to a political committee. 11 C.F.R. §§100.94 and 100.155. 12. Members of the House of Representatives cannot serve for compensation as an officer or board member of an association, corporation, or other entity. House Rule XXV §2(d). Members of the Senate can serve as an officer or board member of a Section 501(c) organization when the Member serves without compensation. Senate Rule XXXVII §6(a)(1).	for both church and personal purposes, can the minister affix a bumper sticker supporting or opposing a candidate? 10. Candidates and incumbents can serve on the governing boards of Section 501(c)(3) organizations.

A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(c)(3) ORGANIZATIONS

ACTIVITY	FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED ("FECA")	INTERNAL REVENUE CODE OF 1986, AS AMENDED ("I.R.C.")
CONSEQUENCES OF VIOLATIONS		
	1. The FEC can bring enforcement proceedings for violations of FECA, otherwise known as "Matters Under Review," or "MURs." MURs are initiated by the FEC, or another person by filing a signed complaint under oath. 2 U.S.C. §437g(a)(1); 11 C.F.R. §111.4. Within five days after the FEC receives the complaint, it must notify in writing any person alleged to have violated FECA. That person has fifteen days to demonstrate, in writing, that no action should be taken against that person based on the complaint. Id. The FEC's General Counsel may recommend whether the FEC should find that there is reason to believe a violation occurred. 11 C.F.R. §111.7. 2. (a) The FEC then decides whether to issue a "Reason To Believe" finding, which requires the affirmative vote of four of six voting commissioners that there is reason to believe a violation occurred. A Reason To Believe finding allows the FEC's Office of General Counsel to move forward in its investigation and gather additional evidence. At this stage, the parties can agree to a settlement known as a conciliation agreement. 2 U.S.C. §437g(a). (b) Generally speaking, at the initial stage in the enforcement process, the FEC will take one of the following actions with respect to a MUR: (i) Find "reason to believe" a respondent has violated the Act; (ii) dismiss the matter; (iii) dismiss the matter with admonishment; or (iv) find "no reason to believe" a respondent has violated the Act. FEC Notice 2007-6, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72	1. (a) Code Section 4955 imposes a two-tiered excise tax on a Section 501(c)(3) organization. The initial tax is ten percent of the impermissible political expenditure. I.R.C. §4955(a)(1). If the violation is not corrected within the taxable period, the second tier tax is one hundred (100%) percent of the expenditure. I.R.C. §4955(b)(1). (b) A political expenditure is any amount paid or incurred in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. I.R.C. §4955(d)(1). The regulations provide that any expenditure that would cause an organization to be classified as an action organization by reason of Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) is a political expenditure. Treas. Reg. §53.4955-1(c)(1). Expenditures for voter registration, voter turnout, and voter education are treated as political expenditures under I.R.C. §4955(b)(2)(E) only if they violate the I.R.C. §501(c)(3) prohibition against campaign intervention. 2002 CPE Text, at 357; see also Treas. Reg. §1.527-6(b)(5) (tax on exempt function expenditures of I.R.C. §527(f), to which Section 501(c)(4) organizations are subject, does not apply to nonpartisan voter registration and get-out-the-vote drives). For the definition of action organization, see Paragraphs 1(c) and 40(b) of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering." (c) Correction means "recovering part or all of the

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	F.R. 12,545-46 (March 16, 2007). (c) The Act requires that the FEC find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. 437(g)(a)(2). The FEC will find "reason to believe" in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation. A "reason to believe" finding will always be followed by either an investigation or pre-probable cause conciliation. For example: ? A "reason to believe" finding followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope. ? A "reason to believe" finding followed by conciliation would be appropriate when the FEC is certain that a violation has occurred and the seriousness of the violation warrants conciliation. A "reason to believe" finding by itself does not establish that the law has been violated. When the FEC later accepts a conciliation agreement with a respondent, the conciliation agreement speaks to the FEC's ultimate conclusions. When the FEC does not enter into a conciliation agreement with a respondent, and does not file a suit, a Statement of Reasons, a	expenditure to the extent recovery is possible, establishment of safeguards to prevent future political expenditures and where full recovery is not possible, such additional corrective action as is prescribed by the Secretary by regulations." I.R.C. §4955(f)(3). (d) The Section 501(c)(3) organization is not under any obligation to attempt to recover the expenditure by legal action if the action would in all probability not result in the satisfaction of execution on a judgment. Treas. Reg. §53.4955-1(e)(1). (e) The taxable period is the period beginning with the date on which the political expenditure occurs, and ending on the earlier of the date of mailing of a notice of deficiency, and the date on which the excise tax is assessed. I.R.C. §4955(f)(4). 2. (a) Code Section 4955 imposes a two-tiered nondeductible excise tax on organization managers who knowingly agree to make an impermissible political expenditure. The initial tax is two and one-half percent of the expenditure, subject to a $5,000 cap per expenditure. I.R.C. §4955(a)(2) and (c)(2). Organization managers who refuse to agree to all or part of the correction are subject to a second tier tax of fifty percent of the expenditure, subject to a $10,000 cap per expenditure. I.R.C. §4955(b)(2). (b) Organization managers are jointly and severally liable for the excise tax. I.R.C. §4955(c)(1). An organization manager means any officer, director, or trustee of the

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	Factual and Legal Analysis, or a General Counsel's Report may provide further explanation of the FEC's conclusions. FEC Notice 2007-6. (d) Pursuant to the exercise of its prosecutorial discretion, the FEC will dismiss a matter when the matter does not merit further use of FEC resources, due to factors such as the small amount or significance of the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an investigation, or when the FEC lacks majority support for proceeding with a matter for other reasons. For example, a dismissal would be appropriate when: ? The seriousness of the alleged conduct is not sufficient to justify the likely cost and difficulty of an investigation to determine whether a violation in fact occurred; or ? The evidence is sufficient to support a "reason to believe" finding, but the violation is minor. Id. (e) The FEC may also dismiss when, based on the complaint, response, and publicly available information, the FEC concludes that a violation of the Act did or very probably did occur, but the size or significance of the apparent violation is not sufficient to warrant further pursuit by it. In this latter circumstance, the FEC will send a letter admonishing the respondent. For example, a dismissal with admonishment would be appropriate when: ? A respondent admits to a violation, but the amount of the violation is not sufficient to warrant any monetary penalty; or	organization (or individual having powers or responsibilities similar to those of officers, directors, or trustees), and with respect to any expenditure, any employee having authority or responsibility over the expenditure. I.R.C. §4955(f)(2). The regulations provide that the IRS will impose excise tax on a manager only if: (i) a tax is imposed on the organization; (ii) the manager knows that the expenditure to which he or she agrees is a political expenditure; and (iii) the agreement is willful and not due to reasonable cause. Treas. Reg. §53.4955-1(b)(1). (c) The test applied in determining whether an organization manager agreed to an expenditure knowing that it is a political expenditure is as follows: (i) The manager has actual knowledge of sufficient facts so that, based solely upon these facts, the expenditure would be a political expenditure; (ii) The manager is aware that such an expenditure under these circumstances may violate the provisions of federal tax law governing political expenditures; and (iii) The manager negligently fails to make reasonable attempts to ascertain whether the expenditure is a political expenditure, or the manager is aware that it is a political expenditure. Treas. Reg. §53.4955-1(b)(4). 3. An organization manager can rely on the advice of counsel to avoid the excise tax. "An organization manager's agreement to an expenditure is ordinarily not considered

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	? A complaint convincingly alleges a violation, but the significance of the violation is not sufficient to warrant further pursuit by the FEC. Id. (f) The FEC will make a determination of "no reason to believe" a violation has occurred when the available information does not provide a basis for proceeding with the matter. The FEC finds "no reason to believe" when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a "no reason to believe" finding would be appropriate when: ? A violation has been alleged, but the respondent's response or other evidence convincingly demonstrates that no violation has occurred; ? A complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible; or ? A complaint fails to describe a violation of the Act. If the FEC, with the vote of at least four Commissioners, finds that there is "no reason to believe" a violation has occurred or is about to occur with respect to the allegations in the complaint, the FEC will close the file and respondents and the complainant will be notified. FEC Notice 2007-6.	knowing or willful and is ordinarily considered due to reasonable cause if the manager, after full disclosure of the factual situation to legal counsel (including in-house counsel) relies on the advice of counsel expressed in a reasoned written legal opinion that an expenditure is not a political expenditure under section 4955 (or that expenditures conforming to certain guidelines are not political expenditures)." Treas. Reg. §53.4955-1(b)(7). The advice of counsel defense does not protect the organization because Section 4955(a)(1) imposes tax on it regardless of whether its actions were willful or due to reasonable cause. 2002 CPE Text, at 361. 4. The IRS can abate the initial excise tax on the organization and its managers if the organization or manager establishes to the satisfaction of the IRS that the political expenditure was not willful and flagrant, and the political expenditure was corrected. Treas. Reg. §53.4955-1(d). See Paragraph 8 for the definition of willful and flagrant. 5. If a Section 501(c)(3) organization agrees to indemnify its managers for payment of the excise tax, whether by employment agreement, general policy applicable to all managers, certificate of incorporation, or by-laws, it must determine whether the indemnification is void as against public policy under the applicable state nonprofit organization statute, and applicable state campaign finance statute. The Section 501(c)(3) organization must also determine whether the organization's indemnification payments to managers for conduct arising out of or relating

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	(g) The FEC commissioners have split on the legal standard necessary for a "reason to believe" finding. One standard is whether there are sufficient facts to conclude that a violation may have occurred. A complaint must set forth sufficient facts, which, if proven true, would show a violation of FECA. Complaints not based on personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations made. Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. The complaint and response must be evenly weighted, but a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in response to the complaint, or available from public sources, such as the FEC's reports database. MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas. (h) The other standard is whether there are sufficient facts to show that a violation had occurred. This standard appears to require a higher level of direct evidence of a violation of FECA. Inferences will not be drawn from circumstantial evidence presented in a complaint. In addition, general denials of a violation could be sufficient to close the matter. It is not enough for the Commission to believe that there is a reason to investigate whether a violation occurred. Instead, the Commission must identify the sources of information and examine the facts and reliability of the sources to determine whether they reasonably give rise to a belief in the truth of	to a state or local election are treated as contributions subject to the limitations of the applicable state campaign finance statute. See generally Norwood P. Beveridge, "Does the Corporate Director Have a Duty Always to Obey the Law?," 45 DePaul Law Review 729 (1998). 6. Since the manager's payment of the excise tax is not deductible by the manager, the organization's payment of the manager's tax through indemnification would be taxable to the manager without an offsetting deduction by the manager. I.R.C. §275(a)(6) (payment of excise taxes under Chapter 42 of the Code not deductible); Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); Huff v. Commissioner, 80 T.C. 804 (1983); Treas. Reg. §1.61-14(a). Accordingly, a full indemnification should include a gross-up on the payment so that after the manager pays income tax on the grossed-up payment, the manager is left with sufficient cash to pay the excise tax. 7. (a) When the Section 4955 excise tax is imposed on a political expenditure, the expenditure is not treated as an excess benefit under the Code Section 4958 intermediate sanctions imposed on public charities. I.R.C. §4955(e). (b) When the Section 4955 excise tax is imposed on a political expenditure, the expenditure is not treated as a taxable expenditure under the Section 4945 excise tax on taxable expenditures of private foundations. I.R.C. §4955(e). The provisions of Section 4945 are similar to those of Section 4955.

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	the allegations presented. MUR 5878 (Pederson 2006), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Peterson. 3. (a) In the next stage of enforcement proceedings, known as the "Probable Cause To Believe" stage, the General Counsel prepares a brief for the commissioners setting forth the results of its investigation, and stating whether it recommends that the commissioners find probable cause that a violation occurred. (b) The respondent can then file a reply brief within fifteen (15) days of receipt of the General Counsel's brief. 2 U.S.C. §437g(a)(3); 11 C.F.R. §111.16. The respondent can also request an oral hearing before the Commission. The Commission will grant the request if two Commissioners agree that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts. The Commission will inform the respondent whether the Commission is granting the respondent's request within thirty days of receipt of the respondent's brief. FEC Notice 2007-21, 72 F.R. 64,919 (Nov. 19, 2007). (c) If four of six voting commissioners vote a finding of probable cause, the parties can conduct settlement negotiations for not less than thirty days, but no more than ninety days. If the commissioners vote a finding of probable cause less than forty-five days before an election, the parties can conduct settlement negotiations for not less than fifteen	8. The IRS has termination assessment and injunctive powers to penalize flagrant political expenditures. I.R.C. §§6852 and 7409(a)(1). The text of the Code does not define a flagrant violation. The 2002 CPE Text refers to Treas. Reg. §1.507-1(c)(2), dealing with the voluntary termination tax, which states that an act is willful and flagrant if it is "voluntarily, consciously, and knowingly committed in violation of chapter 42 (other than section 4940 or 4948(a)) and which appears to a reasonable man to be a gross violation of any such provision." 2002 CPE Text, at 361-62. 9. The I.R.C. §527(f) tax on exempt function expenditures generally does not apply to Section 501(c)(3) organizations. S. Rep. No. 93-1357, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7478, 7507. The tax can apply to a Section 501(c)(3) organization's activities in support of or opposition to a nominee for appointive office. I.R.C. §527(e)(2). For the Section 501(c)(3) organization to avoid the tax, it must form a PAC to make the expenditures for these activities. I.R.C. §527(f)(3); 2003 CPE Text, at L-13 to L-14. 10. The IRS can revoke the Section 501(c)(3) organization's tax-exempt status. With the exception of churches and their related organizations, the organization is ineligible for reclassification as a Section 501(c)(4) organization. I.R.C. §504(a)(2)(B) and (c); Branch Ministries, Inc. v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000); Christian Echoes National

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	days. If a conciliation agreement is reached, the FEC must make the agreement public. 2 U.S.C. §437g(a)(4)(B)(ii). In the absence of a violation of the conciliation agreement, the agreement operates as a complete bar to further civil action by the FEC. 2 U.S.C. §437g(a)(4)(A)(i). (d) If negotiations do not result in a conciliation agreement, the commissioners, by the affirmative vote of four commissioners, can authorize the Office of General Counsel to file suit for recovery of a civil penalty. 2 U.S.C. §437g(a)(6)(A). 4. The civil penalty, whether resulting from a conciliation agreement or suit, cannot exceed the greater of $5,500, and an amount equal to the impermissible contribution. If the FEC or court determines that there is clear and convincing proof that a knowing and willful violation occurred, the penalty cannot exceed the greater of $11,000, and an amount equal to 200% of the impermissible contribution. 2 U.S.C. §437g(a)(5)-(6); 11 C.F.R. §111.24(a)(1)-(2). The $5,500 and $11,000 amounts are subject to cost-of-living adjustments under the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §2461 nt. For violations that occur after July 1, 2009, the $5,500 amount has been increased to $7,500, and the $11,000 amount has been increased to $16,000. 74 F.R. 31,345, 31,347 (July 1, 2009). 5. Any person who knowingly and willfully violates any provision of FECA that involves the making, receiving, or reporting of any contribution, or the reporting of an expenditure having an aggregate value of $2,000 or more but	Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). 11. The IRS can seek to impose the Section 4955 excise tax, and also seek to revoke the Section 501(c)(3) organization's tax-exempt status. The IRS seeks to impose the excise tax instead of revocation only when the prohibited expenditure is unintentional, small in amount, and the organization has adopted procedures to prevent future similar expenditures. H.R. Rep. No. 100-391, Part II, 100th Cong., 1st Sess. 1623-24 (1987), reprinted in 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-1203 to 1204; Preamble, Final Regulations on Political Expenditures by Section 501(c)(3) Organizations, 60 F.R. 62,209 (Dec. 5, 1995); 2002 CPE Text, at 353-54. See also T.A.M. 200437040 (Sept. 10, 2004) (IRS should exercise its discretion to impose only the Section 4955 excise tax, and not revocation, when the campaign intervention statements were only two brief paragraphs in two broadcasts during the presidential campaign. No other campaign intervention statements during the three years at issue appear to have occurred. The organization has since adopted a policy to prevent recurrences of campaign intervention statements). 12. (a) A charitable contribution deduction is disallowed for contributions to a Section 501(c)(3) organization that violates the prohibition on campaign intervention. I.R.C. §170(c)(2)(D); Treas. Reg. §1.170A-1(j)(5); Cavell v. Commissioner, T.C. Memo. 1980-516.

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	less than $25,000 during a calendar year is subject to a fine of up to $100,000 for individuals and $200,000 for entities, imprisonment for not more than one year, or both. The one year cap is increased to two years for knowing and willful violations of the prohibition on contributions in the name of another. For contributions or expenditures aggregating $25,000 or more during a calendar year, the penalty is a fine of up to $250,000 for individuals and $500,000 for entities, imprisonment for up to five years, or both. 2 U.S.C. §437g(d)(l)(A); 18 U.S.C. §3571(b)(3) and (5) and (c)(3) and (5). The $2,000 limitation is reduced to $250 for certain knowing and willful violations involving the solicitation of contributions to a PAC and the expenditure of PAC funds. 2 U.S.C. §437g(d)(l)(B). 6. Good faith reliance on an FEC advisory opinion is a complete defense to any sanction for the person or entity that requested the opinion. In addition, any other person or entity involved in an activity that is indistinguishable in all material aspects from the activity referred to in the advisory opinion has a complete defense. 2 U.S.C. §437f(c). 7. A conciliation agreement entered into by a defendant with the FEC may be introduced as evidence of the defendant's lack of knowledge or intent to commit an offense. 2 U.S.C. §437g(d)(2). In addition, a court, in a criminal action and in weighing the seriousness of the violation and in considering the appropriateness of the penalty, shall take into account whether the violation is the subject of a conciliation agreement, whether the conciliation agreement is in effect,	13. A Section 501(c)(3) organization that loses its tax-exempt status likely will face claims by contributors, whose contributions are no longer deductible, for rescission and return of their contributions. Contributors who do not itemize deductions and therefore do not have the tax benefit of a charitable contribution deduction may lack standing to bring these claims. 14. (a) The IRS has issued guidance on a taxpayer's entitlement to a charitable contribution deduction when the taxpayer makes a contribution before the date that the IRS publicly announces that the organization ceases to qualify as one contributions to which are deductible under Code Section 170(c). Rev. Proc. 2011-33, 2011-25 I.R.B. 887. (b) To determine whether an organization is one to which a taxpayer can make tax-deductible contributions, the IRS publishes the Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986, otherwise known as IRS Publication 78. Publication 78 is available on the IRS Website at http://www.irs.gov, and is incorporated into the search tool, Exempt Organizations Select Check, at http://apps.irs.gov/app/eos. The IRS Website also contains an extract of certain information on tax-exempt organizations from the IRS's Business Master File (BMF) with more information than Publication 78. The BMF is available at http://www.irs.gov/uac/SOI-Tax-Stats---Exempt-Organizations-Business-Master-File-Extract-(EO-BMF). Unlike Publication 78, the BMF extract contains information on all IRS-recognized tax-

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	and whether the defendant has complied with it. 2 U.S.C. §437g(d)(3). 8. (a) Knowing and willful violations of FECA were subject to the federal sentencing guidelines prior to the United States Supreme Court's decisions in United States v. Booker, 125 S. Ct. 738 (2005), and United States v. Fanfan, 125 S. Ct. 738 (2005). In these decisions, the Court struck down the requirement that courts impose a sentence within the guidelines' range, absent circumstances justifying a departure. This requirement violated the Sixth Amendment right to a jury trial, which prohibits a judge from increasing a sentence beyond the one that could have been imposed based only on the facts found by the jury. The Court then directed sentencing courts to consider the guidelines in imposing a sentence. Assuming that a corporation has a Sixth Amendment right to a jury trial, and since courts must consider the guidelines, courts will likely consider a corporation's compliance program in imposing a sentence. Furthermore, a corporation can argue that its compliance program is entitled to greater weight as a mitigating factor than otherwise provided by the guidelines. See also Southern Union Co. v. United States, 132 S. Ct. 2344 (2012) (Sixth Amendment right to a jury trial requires that any fact that increases the maximum sentence of a criminal fine be submitted to the jury). (b) The United States Supreme Court elaborated on its Booker and Fanfan jurisprudence in three cases in 2007 with more than a touch of incoherency. A court of appeals "may	exempt organizations in addition to those that can receive tax-deductible contributions. (c) Taxpayers can rely Exempt Organizations Select Check and the BMF extract to determine whether a charitable contribution to a tax-exempt organization is deductible. Taxpayers can also search Exempt Organizations Select Check for organizations that have automatically lost their tax-exempt status under Code Section 6033(j) for failure to file a Form 990 return or notice for three consecutive years. The IRS updates Exempt Organizations Select Check monthly. Rev. Proc. 2011-33, 2011-25 I.R.B. 887; IRS News Release IR-2012-34. (d) Exempt Organizations Select Check lists only organizations that have received exemption determinations from the IRS. As a result, Exempt Organizations Select Check does not cover all Section 501(c)(3) organizations. In addition, it does not cover: (i) local charitable, educational, and religious organizations that are controlled by national religious organizations; and (ii) local organizations that are subsidiary to national, regional, parent, or central organizations, such as the American Legion, Red Cross, and churches and religious orders. (e) Another method to determine whether an organization is one to which a taxpayer can make tax-deductible contributions is the taxpayer's reliance on an organization's determination letter issued by he IRS of its status under Code Section 170(b)(1)(A)(vi) or 509(a)(2). Treas. Reg. §§1.170A-9(f)(5); 1.509(a)-3(e); and 1.509(a)-

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	apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," but the "presumption is not binding." Rita v. United States, 127 S. Ct. 2456, 2462-63 (2007). A trial judge may determine that a "within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." Since the Guidelines are advisory, the trial judge can depart from the Guidelines based on the judge's disagreement with the Sentencing Commission's policy determinations. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007). When a court of appeals reviews a sentence, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect §3553(a) considerations' even in a mine-run case." Id. at 575 (quoting from Rita, 127 S. Ct. at 2465) (under 18 U.S.C. §3553 a court, in imposing a sentence, must satisfy the four traditional objectives of sentencing and consider seven factors). Finally, "while the extent of the difference between a particular sentence and the recommended Guideline range is surely relevant, courts of appeal must review all sentences - whether inside, just outside, or significantly outside the Guidelines range - under a deferential abuse of discretion standard." Gall v. United States, 128 S. Ct. 586, 591 (2007). The trial judge, in determining the appropriate sentence, "may not presume that the Guidelines range is reasonable," and "must make an individualized assessment based on the facts presented." When the trial judge determines that an outside-Guidelines sentence is appropriate, the judge "must consider the extent of the deviation and ensure that the justification is sufficiently	7(a). (f) The taxpayer can rely on the determination letter until the IRS modifies or revokes the letter, a court issues a contrary ruling, or the IRS publishes revocation of the organization's tax-exempt status in the Internal Revenue Bulletin, the IRS Website, Exempt Organizations Select Check, BMF extract, or other means designed to put the public on notice. Treas. Reg. §§1.170A-9(f)(5); 1.509(a)-3(e); and 1.509(a)-7(a); Rev. Proc. 2011-33, §2, 2011-25 I.R.B. 887; Clopton Estate v. Commissioner, 93 T.C. 275 (1989). (g) A taxpayer cannot rely on the rules of Paragraph 14(e)-(f) if the taxpayer was responsible for or was aware of the act or failure to act that caused the organization's loss of tax-exempt status, or knew that the IRS had notified the organization of this loss. Treas. Reg. §§1.170A-9(f)(5)(ii); 1.509(a)-3(e)(2)(i); and 1.509(a)-7(a). Generally, a taxpayer who is not one of the organization's founders, creators, or Code Section 4946(b) managers is not considered to be responsible for or aware of the act or failure to act that caused the loss of tax-exempt status if the taxpayer made his or her contribution in reliance on the organization's written statement that the contribution would not cause the organization's loss of tax-exempt status. Treas. Reg. §§1.170A-9(f)(5)(iii) and 1.509(a)-3(e)(2)(2)(ii). (h) Contributions to a sham charitable or religious organization formed for the purpose of evading tax are not

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	compelling to support the degree of variance." Id. at 596-97. (c) The Guidelines of the United States Sentencing Commission for FECA violations were contained in the United States Sentencing Guidelines Manual §§2C1.1-2C1.8 (Nov. 1, 2003). The Guidelines provided for a base offense level of 8, and five offense characteristics for aggravating conduct that enhance the punishment: (i) a reference to the fraud loss table in §2B.1 to increase the offense level by reference to the amounts involved in illegal campaign finance transactions; (ii) alternative enhancements if the offense involved a foreign national (2 levels) or a foreign government (4 levels); (iii) alternative enhancements of 2 levels each if the offense involved governmental funds or an intent to derive a specific, identifiable nonmonetary federal benefit; (iv) a 4 level enhancement if the offender engaged in thirty or more illegal transactions; and (v) a 4 level enhancement if the offense involved the use of intimidation, threat of pecuniary or other harm, or coercion. (d) If an offense occurs even though the organization had in place at the time of the offense an Effective Compliance and Ethics Program, the organization receives a three point mitigating factor reduction in its Culpability Score. §8C2.5(f)(1). This score determines the multiplier that applies to the organization's base-level fine and is directly proportional to the magnitude of the organization's culpability. The organization does not receive the reduction if, after becoming aware of an offense, it unreasonably delayed reporting the offense to appropriate governmental	deductible regardless of whether the IRS erroneously issued a determination letter. Warden v. Commissioner, T.C. Memo. 1988-165. (i) If the IRS revokes the tax-exempt status of an organization listed in Exempt Organizations Select Check or the BMF extract, taxpayers unaware of the change in status are entitled to a charitable contribution deduction for contributions made on or before the date that the IRS publicly announces that the organization ceases to qualify as one contributions to which are deductible under Code Section 170(c). The IRS can make its public announcement in the Internal Revenue Bulletin, on the IRS Website, Exempt Organizations Select Check, BMF extract, or other means designed to put the public on notice. A similar rule applies if an organization automatically loses its tax-exempt status under Code Section 6033(j) for failure to file a Form 990 return or notice for three consecutive years. Rev. Proc. 2011-33, §3.01, 2011-25 I.R.B. 887. (j) If a taxpayer incurs a legally enforceable obligation under local law before the date of the public announcement, and satisfies the obligation after that date, the IRS may extend the allowance period for the deduction by specific exercise of its authority under Code Section 7805(b). Rev. Proc. 2011-33, §3.01, 2011-25 I.R.B. 887. (k) The IRS may disallow a charitable contribution deduction after an organization ceases to qualify under Code Section 170(c) when the contributor: (i) had

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	authorities. §8C2.5(f)(2). See generally Robert S. Bennett, Hilary Holt LoCicero & Brooks M. Hanner, "From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney," 68 The Business Lawyer 411 (Feb. 2013); Paul Fiorelli & Ann Marie Tracey, "Why Comply? Organizational Guidelines Offer a Safe Harbor in the Storm," 32 Journal of Corporation Law 467 (Spring 2007); Robert G. Morvillo & Robert J. Anello, "Corporate Compliance Programs: No Longer Voluntary," New York Law Journal, Dec. 7, 2004, at 3. (e) The amendments to the Sentencing Guidelines effective as of November 1, 2004 substantially tightened the requirements for an organization's Effective Compliance and Ethics Program, §8B2.1. One of the requirements is that the organization's program "be promoted and enforced consistently throughout the organization through (i) appropriate incentives to perform in accordance with the compliance and ethics program; and (ii) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct." §8B2.1(b)(6). Another requirement is that the organization, after discovering the criminal conduct, must take reasonable steps to "respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." §8B2.1(b)(7).	knowledge of the revocation of the ruling or determination letter before publication of the revocation; (ii) was aware that revocation was imminent; or (iii) was in part responsible for, or was aware of, the organization's activities or deficiencies that triggered the loss of qualification. Rev. Proc. 2011-33, §3.01, 2011-25 I.R.B. 887. (l) The provisions of Section 3.01 of Rev. Proc. 2011-33 do not apply to organizations that are not listed in Exempt Organizations Select Check or the BMF extract. Rev. Proc. 2011-33, §3.04, 2011-25 I.R.B. 887. (m) When a third-party gives a taxpayer information on an organization from the BMF extract, the taxpayer can rely on the information if the third-party gives the taxpayer a report that states: (i) the organization's name, employer identification number, and Code Section 509(a)(1), (2), or (3) status (including the supporting organization type); (ii) whether contributions to the organization are deductible; (iii) that the information comes from the most current update of the BMF extract; (iv) the BMF extract revision date; and (v) the date and time that the third-party provides the information to the taxpayer. The taxpayer must retain a hard copy or electronic copy of the report. Rev. Proc. 2011-33, §4, 2011-25 I.R.B. 887. 15. For a discussion of the consequences of violation of the insubstantiality limitation on lobbying, see Paragraph 42 of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering." For a

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	(f) Under Application Note 6 to §8B2.1(b)(7) effective as of November 1, 2010, the organization must take reasonable steps to remedy the harm caused by the criminal conduct, and reasonable steps to prevent further similar criminal conduct. Reasonable steps to remedy the harm may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps may include self-reporting and cooperation with authorities. Reasonable steps to prevent further similar criminal conduct may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications to the compliance program. (g) By granting the organization the discretion to determine whether to provide restitution, the Sentencing Guidelines avoid placing the organization in the position of providing restitution to qualify for the reduction in the Culpability Score but without knowing whether the sentencing judge will order restitution, and taking the risk of having to pay the same victims twice if they bring civil litigation. (h) The amendments to the Sentencing Guidelines effective as of November 1, 2010 further tighten the requirements for an organization's Effective Compliance and Ethics Program. §§8B2.1 and 8C2.5(f)(3). The organization should take reasonable steps to remedy the harm resulting from the criminal conduct. Such steps include self-reporting and cooperation with authorities. In addition, the amendment allows an organization to receive a three point mitigating factor reduction in its Culpability Score for an Effective	discussion of the consequences of failure to satisfy the requirements of the lobbying safe harbor election under Code Sections 501(h) and 4911, see Paragraphs 44 to 46 of the I.R.C. column for "Regulatory Provisions on Contributions, Expenditures, and Electioneering." 16. The IRS can initiate an inquiry of a religious organization only if the Director, Exempt Organizations, Examinations, reasonably believes, based on a written statement of the facts and circumstances, that the organization may not satisfy the requirements for tax-exemption under Section 501(c)(3). I.R.C. §7611; IRS Internal Revenue Manual 4.76.7.4.1 (June 1, 2004). The IRS must then give written notice to the church explaining the inquiry's general subject matter and the concerns that gave rise to it. If the church's response does not adequately address the IRS's concerns, and the IRS wishes to examine the church's records and religious activities, the IRS must provide a second written notice to the church. This notice must include a copy of the inquiry notice, a description of the records and activities the IRS seeks to examine, an offer for a conference to discuss and resolve concerns, and copies of IRS documents collected or prepared for the examination that are subject to disclosure under the Freedom of Information Act and tax laws.

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	Compliance and Ethics program when an organization's high-level or substantial authority personnel are involved in the offense as long as the organization satisfies the following four requirements: (i) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization's governing authority or appropriate subgroup thereof; (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely; (iii) the organization promptly reported the offense to the appropriate governmental authorities; and (iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense. §8C2.5(f)(3). (i) Under Application Note 11 to §8C2.5, an individual has direct reporting obligations to the governing authority or an appropriate subgroup thereof if that individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof: (i) promptly on any matter involving criminal conduct or potential criminal conduct; and (ii) no less than annually on the implementation and effectiveness of the compliance and ethics program. The purposes of this requirement are to maintain a compliance officer's independence from the organization's management, and to encourage the organization to maintain a formal policy that sets forth the compliance officer's right of access to matters of criminal inquiry.	

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	(j) It is important to note that the direct reporting requirement is necessary for the reduction in the Culpability Score only when high-level or substantial authority personnel are involved in the offense. Since it is difficult to predict who will commit an offense, the prudent course is for the organization to satisfy all the requirements of the Sentencing Guidelines for an Effective Compliance and Ethics Program. 9. On August 28, 2008, the United States Department of Justice issued its Principles of Federal Prosecution of Business Entities, otherwise known as the Filip Memorandum. The Filip Memorandum contains the Department's guidelines on compliance programs, and has been incorporated into the U.S. Attorneys' Manual. First, the existence of a compliance program is not sufficient, by itself, to justify not charging a corporation for criminal misconduct by its directors, officers, and employees. Second, the critical factors in evaluating a compliance program are whether the program is designed for maximum effectiveness in preventing and detecting wrongdoing, and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. Third, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Fourth, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and	

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	United States Attorneys, "Principles of Federal Prosecution of Business Organizations," §9-28.800 (Aug. 28, 2008) (available at http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf); United States Department of Justice, United States Attorneys' Manual §9-28.800 (2008) (the "Filip Memorandum"). 10. (a) A corporation can indemnify its PAC's officers and employees for fines, judgments, and settlements resulting from PAC activities. The indemnification is treated as a permissible payment of PAC administrative expenses, and not an impermissible contribution. 11 C.F.R. §114.5(b); FEC Advisory Opinion No. 1991-35; FEC Advisory Opinion No. 1980-135. A corporation can pay the premiums for insurance for liability and indemnification of its PAC's officers and members. This payment is also treated as a permissible payment of PAC administrative expenses, and not an impermissible contribution. FEC Advisory Opinion No. 1979-42. See also Treas. Reg. §1.527-6(b)(1) (fundraising, overhead, and recordkeeping expenses, and expenses allowed by FECA or similar state statute, are not expenditures subject to the I.R.C. §527(f) tax on exempt function expenditures). (b) If a nonprofit corporation wishes to indemnify its PAC's officers and employees, whether by employment agreement, general policy applicable to all employees or a specified group of employees, or bylaws, it must determine whether the indemnification is void as against public policy under the applicable state nonprofit statute. See generally Norwood P. Beveridge, "Does the Corporate Director Have a Duty	

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	Always to Obey the Law?," 45 DePaul Law Review 729 (1998). 11. (a) In the infamous Thompson Memorandum, the United States Department of Justice considered a corporation's indemnification of an employee's attorney's fees as showing a lack of cooperation with the government, which was an important factor in the government's decision of whether to indict the corporation. Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, "Principles of Federal Prosecution of Business Organizations," Jan. 20, 2003, at 5 ("Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees,[4] through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty. [4]Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.") (available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm).	

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	(b) In United States v. Stein, 435 F. Supp. 2d 330, 364, 366 (S.D.N.Y. 2006), the court held that the Thompson Memorandum violated a defendant's Fifth Amendment due process rights and Sixth Amendment right to counsel. ("It [the Thompson Memorandum] discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. It does so in the face of state indemnification statutes that expressly permit business entities to provide those means because the states have determined that legitimate public interests may be served. It does so even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It therefore burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails strict scrutiny. The legal fee advancement provision violates the Due Process Clause.") ("The Thompson Memorandum on its face and the USAO's actions were parts of an effort to limit defendants' access to funds for their defense. Even if this was not among the conscious motives, the Memorandum was adopted and the USAO acted in circumstances in which that result was known to be exceptionally likely. The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment.")	

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	(footnotes omitted). (c) To reach the result in Stein, the trial court had to assert ancillary jurisdiction over the state law contract dispute between KPMG, a nonparty, and the defendants over KPMG's obligation to pay the defendants' attorney's fees. On appeal, in Stein v. KPMG, LLP, 486 F.3d 753, 763 (2d Cir. 2007), the Second Circuit vacated the trial court's order asserting ancillary jurisdiction as beyond its power, and provided the following guidance on the available remedies: [E]ven if there were constitutional violations and even if KPMG is contractually obligated to advance appellees' attorneys' fees and costs, creating an ancillary proceeding to enforce that obligation was not the proper remedy. If the government's coercion of KPMG to withhold the advancement of fees to its employees' counsel constitutes a substantive due process violation, or has deprived appellees of their qualified right to counsel of choice, more direct (and far less cumbersome) remedies are available. Assuming the cognizability of a substantive due process claim and its merit here, dismissal of the indictment is the proper remedy. As for the Sixth Amendment deprivation, if it turns out that the government's conduct separates appellees from their counsel of choice (an event that has not yet occurred), appellees may seek relief on appeal if they are convicted. We do not mean to exclude the possibility of other forms of relief. If, for example, a Sixth Amendment violation is the result of ongoing government conduct, the district court of course may order the cessation of such conduct. Having said that, we	

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	hold, however, that the remedies available to the district court in the circumstances presented here did not include its novel exercise of ancillary jurisdiction. See generally Robert G. Morvillo & Robert J. Anello, "Ancillary Jurisdiction in Criminal Cases," New York Law Journal, June 5, 2007, at 3, 6. (d) On remand, the trial court held three of the defendants were deprived by the government's actions of the counsel they chose, and as a result of those actions, "they simply lack the resources to engage the lawyers of their choice, lawyers who had represented them as long as KPMG was paying the bills." United States v. Stein, 495 F. Supp. 2d 390, 421 (S.D.N.Y. 2007) (footnote omitted). In addition, these three defendants and nine other defendants "have been forced by KPMG's cutoff of defense costs to curtail the defenses they would have mounted had KPMG paid those costs." 495 F. Supp. 2d at 423. Accordingly, dismissal of the indictment was the appropriate remedy. (e) On August 28, 2008, the Second Circuit in United States v. Stein, 541 F.3d 130 (2d Cir. 2008), upheld the dismissal of all charges against all the defendants: We hold that KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action. We further hold that the government thus unjustifiably	

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	interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants. In light of this disposition, we do not reach the district court's Fifth Amendment ruling. [541 F.3d at 136 (footnote omitted)] 12. In an apparent display of Divine Providence, on August 28, 2008, the same day that the Second Circuit issued its decision in United States v. Stein, the United States Department of Justice issued the Filip Memorandum. The Filip Memorandum provides the following guidelines in Section 9-28.730 for prosecutors to evaluate a corporation's cooperation and the payment of its employees' attorney's fees in deciding whether to charge a business entity: In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.[6] Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. §1503. If the payment of attorney fees	

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	were used in a manner that would otherwise constitute criminal obstruction of justice — for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false — these Principles would not (and could not) render inapplicable such criminal prohibitions. [6] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, sometimes arise in the course of an investigation under certain circumstances — to take one example, to assess conflict-of-interest issues. Such questions can be appropriate and this guidance is not intended to prohibit such limited inquiries.	