

# Political Activity in a Nonprofit World

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# Overview

- Corporate Political Activity
- Independent Activity, PACs, Non-partisan activity
- Do's and Don'ts of Employee Activity
- Political Activity v. Permitted Lobbying
- Lobbying by 501(c)(3) Organizations
- Benefits of 501(h) Election

# Political Activity by Non-Profits

Many charities are reluctant to engage in any activity that appears political in any way.

## General rule:

- Both for-profit and non-profit corporations are prohibited from using corporate resources for political purposes
- Implications for a 501(c)(3) are far greater because of added tax consequences

**But:** There are some significant exceptions

# General Rule

## Political Activity by Corporations is Strictly Prohibited

**State Law:** A corporation is prohibited, under Ohio's campaign finance laws, from using its money or property for partisan political purposes. ORC 3599.03.

**Federal Law:** The Federal Election Campaign Act (FECA) generally prohibits corporations and labor organizations from using their general treasury funds from making contributions or expenditures in connection with federal elections. 2 U.S.C. 441b(a).

# General Rule

**Partisan Political Purposes:** Activities that aide or oppose a political party, candidate for election or nomination to public office, a PAC, legislative campaign fund, or organization that supports or opposes any such candidate for any partisan political purpose.

**In-Kind Contributions:** Includes direct monetary contributions as well as in-direct (“in-kind”) support.

**Partnerships** are not included in the ban, but are treated separately and more as individuals.

# The Exceptions

1. Independent Expenditures  
*Citizens United and Super PACs*
2. Corporate-Sponsored PACs  
*Establishing and Running a Corporate PAC*
3. Ballot Issue Activity  
*State and Local Ballot Issues*
4. Non-Partisan Party Support  
*Levin Funds, Building Funds and Educational Efforts*
5. Conventions and Transitions

# #1 Independent Expenditures

***Citizens United (2010)***: Corporations, trade associations and labor associations may use general treasury funds to make independent communications that expressly advocate the election or defeat of a political candidate or to fund independent electioneering communications.

**OEC Advisory Opinion 2010ELC-02**: Allows corporation to participate in independent partisan political activities without being subjected to a finding of a violation.

Corporations are still prohibited from making **direct** contributions to candidates.



# #1 Independent Expenditures

- MUST BE TRULY INDEPENDENT (Not made with the cooperation or with the prior consent of or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.)
- Complex rules under state and federal law for assuring independence
- No contribution or spending limitations
- Disclosure is required



# #1 Independent Activity: Super PACs

- Two months after Citizens United, federal appellate court holds that contributions to groups making only independent expenditures were unlimited  
*SpeechNow.org v. FEC.*
- Super PACs were created as a way for corporations and others to pool contributions to make independent expenditures
- Same rules apply to Super PACs:
  - Expenditures cannot be coordinated
  - Reporting is generally required

# #1 Independent Activity: Super PACs

- As of August 26, 2012, over 800 Super PACs registered with FEC
- Total reported receipts of \$349,763,463 for 2012 cycle
- Total independent expenditures of \$214,759,909 in the 2012 cycle

# #1 Independent Activity: 5 Largest Super PACs in 2012

- **Restore Our Future**

- \$82 million in expenditures

Supports Romney

- **Priorities USA Action**

- \$22 million in expenditures

Supports Obama

- **Winning Our Future**

- \$17 million in expenditures

Supports Gingrich

- **American Crossroads**

- \$12 million in expenditures

Conservative candidates

- **Club For Growth**

- \$11 million in expenditures

Conservative candidates



# #1 Independent Activity: Super PACs

- Largely supported by wealthy individuals who cannot contribute more directly to the candidate
  - Used to fund so-called “527s”
  - Now, the Super PAC
- Very little corporate participation in Super PACs
  - Corporate concerns over shareholder reactions
  - Uncertainty in status of law
  - Risk of investigation into coordination

# #1 Independent Activity: Super PACs

- Use of 501(c)(4) organizations or other entities to make contributions instead
  - Disclosure still required, but to IRS
  - Less uncertainty in status of law
  - Risk of investigation by IRS

## #2 Corporate Sponsored PAC

- Corporations may use corporate funds to operate a connected PAC
  - Administrative expenses only
  - NO corporate funds directly to candidates, PACs or parties
- Reporting requirement
- Contribution limits

# #2 Corporate Sponsored PAC

## Ohio Law:

- Designation of Treasurer (Form 30-D)
- Name
- Address
- Bank Account (separate)
- Members, Contribution Limits, Registration Number, Reporting (Federal-State-Local PAC?)



# #2 Corporate Sponsored PAC

## Federal Law:

- Statement of Organization (FEC Form 1)
- Separate Segregated Fund
- Designation of Treasurer
- Name – w/ Connected Organization
- Separate Account
- Members, Contribution Limits (multi-candidate PAC?), Reporting, Registration Number

# #2 Corporate PACs

- **IRS Considerations:** Nonprofit Tax Exempt Corporations
  - Section 501(c)(3) – Charitable Organizations
    - Absolute ban on partisan political activity
  - Section 501(c)(4) – Social Welfare Organizations
    - Exempt Purpose
  - Section 501(c)(6) – Business League Organizations
    - Exempt Purpose

# #3 Ballot Issue Activity

- Ballot Issue Support
  - Corporations may use money or property to support proposed or certified ballot issues. ORC 3599.03
  - State wide issues or local levies
  - No limits and corporate dollars permitted

# #3 Ballot Issue PACs

- **Definition:** A PAC that is organized to support or oppose a proposed or certified ballot issue or question. (“Ballot Issue PAC” or “Levy Committee”)
- **Registration:** When & Where
  - Prior to receiving any contributions or making any expenditures, the ballot issue PAC must file a Designation of Treasurer Form
  - SOS or county BOE. “Designation of Treasurer Form” (30-D) with the Secretary of State

# #3 Ballot Issue PACs

- PAC must report:
  - Reports are based on the nature and timing of the activity in which the PAC engages in relation to any election
  - Pre-general; post-general; semiannual; or annual
- Corporate Donors must also report:
  - Corporate Contribution Reports
  - 30-B-1 (direct contributions) 30-B-2 (in kind support)

# #4 Party Support

## Building Fund

- Corporate gifts permissible
- Gifts used only for a specific purpose – help defray the cost of construction, renovation or purchase of an office building, so long as the office is not used solely for the purpose of directly influencing the election of any individual candidate
- Contribution may not exceed 10 percent of the cost of the construction, renovation or purchase
- Must be reported by Party

# #4 Party Support

## Levin Account

- Corporate gifts permissible – up to \$10,000 in any year in which federal candidates are on the ballot
- Gifts used only for a specific purpose – generic campaign activity, voter registration and get-out-the-vote efforts that do not constitute a contribution to a political candidate
- Must be disclosed by Party



# #4 Party Support

## Restricted Fund

- Corporate gifts permissible – up to \$10,000 per year
- Gifts used only for a specific purpose – defraying operating and maintenance costs associated with political party headquarters, including rental or leasing costs, staff salaries, office equipment and supplies, postage, and the purchase, lease or maintenance of computer hardware and software
- Must be disclosed by the Party

# #5 Conventions and Transition Funds

## National Party Convention Activities

- RNC – Tampa, FL (August 27 – 30, 2012)
- DNC – Charlotte, NC (Sept. 4 – 6, 2012)
  - Generally – corporate funds prohibited in conjunction with federal elections, including national conventions, and, specifically with respect to delegate activities
  - “Party Building” activities, “unofficial” convention parties & activities, etc.

# #5 Conventions and Transition Funds

## Transition Fund

- Corporations may make donations to a fund established by a public official (or officeholder-elect) for transition activities or inaugural celebrations
- Limits apply
- Disclosed

# General Do's and Don'ts

## Permissible Activity

- Personal participation in ballot issue or candidate campaigns on their own time
- Display yard signs at home or have a bumper sticker on personal cars
- Vacation or other leave time to volunteer for a political campaign by distributing literature, soliciting donations, talking about the campaign, or any other volunteer activity
- Use of personal funds to contribute to a political cause or candidate up to any applicable contribution limits

# General Do's and Don'ts

## Permissible Activity

- Draft and send a letter supporting or opposing an issue or candidate or soliciting contributions, so long as the letter is on personal stationary, with mailing and printing costs paid for by the individual
- A personal letter to the editor or other communication may state the reasons why the employee supports or opposes an issue or candidate
- Host or organize a candidate fundraiser, using personal resources to do so
- Sale or rental, at fair market value, of corporate facilities or resources to an employee or candidate for a political activity

# General Do's and Don'ts

## Prohibited Activity

- Providing work time or corporate resources for partisan activity
- Requiring employee participation in partisan activity
- Denying vacation or other leave because of the nature of the political activity involved
- Forgetting about the state or federal pay-to-play laws



# General Do's and Don'ts

## Prohibited Activity

- No employer should coerce, entice, or threaten in any manner to make a donation or vote a certain way
- Printing on pay envelopes any statements intended or calculated to influence the political activity of employees
- Use of any corporate resources for partisan activity without getting payment of the fair market value of the resources used, preferably paying for the resources in advance.
- Making exceptions to any internal policies for political reasons



# Lobbying Activity By Non-Profit Organizations

## Permitted Activity: Lobbying

- Definition of Lobbying: Any communication that refers to, and expresses a view on, specific legislation.
- Can include ballot issue activity
- Includes legislation that is drafted or introduced at the national, state or local level

**Remember:** All other federal, state and local lobbying laws still apply.

# Lobbying Activity By Non-Profit Organizations

## Limitations on Lobby Activity

- Tax exempt 501(c)(3) non-profit organizations are prohibited from lobbying “**except to an insubstantial degree**”
- The IRS applies one of two different rules, or tests, to determine if lobbying is “substantial”:
  - 1) Insubstantiality rule
  - 2) 501(h) election

# Lobbying Activity By Non-Profit Organizations

## IRS Insubstantiality Rule

- IRS § 501(c)(3) since 1934:
  - “no substantial part of [a charity’s] activities [should include] carrying on propaganda, or otherwise attempting to influence legislation...”
- “Substantial” is not further defined
- IRS looks at all the facts and circumstances
- Vague and subjective

# Lobbying Activity By Non-Profit Organizations

## 501(h) Election

- Adopted in 1976
- Sets clearly defined parameters
- Not available to churches

26 USC § 501(h)

# Lobbying Activity By Non-Profit Organizations

## 501(h) Advantages

- **Definitions** of lobbying communications are clearer
- Higher dollar limits for lobbying expenditures
- Four-year averaging applied before tax-exempt status reworked
- Volunteer activity is exempt

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# Lobbying Activity By Non-Profit Organizations

## 501(h) Definitions

IRS regulations define two types of lobbying communication:

1. Direct Lobbying
2. Grass Roots Lobbying

# Lobbying Activity By Non-Profit Organizations

## Definitions: 501(h) Direct Lobbying

- Refers to influencing specific legislation
- Reflects a view on legislation
- Communications by charity or its members directed to legislator or an employee
- Encourages general public to take some action:

***“ Please call Senator Smith  
and tell him to support . . . ”***



# Lobbying Activity By Non-Profit Organizations

## What Is Not Lobbying? (5 categories)

1. **Non-partisan analysis or research**
2. **Technical advice:** providing technical advice to a governmental body in response to a written request from the government (e.g., a congressional committee studying scholarship funds asks for nonprofit's opinion)
3. **Self-defense:** communication on any legislation that would affect an organization's existence, powers and duties, tax-exempt status, or deductibility of contributions

# Lobbying Activity By Non-Profit Organizations

## What Is Not Lobbying? (5 categories, cont.)

4. **Communications with members:** Communication with the organization's own members with respect to legislation which is of direct interest to them, so long as the discussion does not address the merits of a specific legislative proposal and does not make a call for action
5. **Communications with government officials:** Communication with governmental officials or employees on non-legislative (e.g., administrative) matters such as rule-making or regulations

# Lobbying Activity By Non-Profit Organizations

## 501(h) Higher Dollar Limits (for nontaxable direct lobbying)

- Nontaxable lobbying amount is the lesser of:
  - \$1 million; or
  - The amount determined under this table:

Exempt expenditures:	Nontaxable amount:
Under \$500,000	20% of exempt expenditures
\$500,000–\$1,000,000	\$100,000 plus 15% of exempt expenditures over \$500,000
\$1,000,000–\$1,500,000	\$175,000 plus 10% of exempt expenditures over \$1,000,000
Over \$1,500,000	\$225,000 plus 5% of exempt expenditures over \$1,500,000

# Lobbying Activity By Non-Profit Organizations

## 501(h) Higher Penalties Threshold

- Greater tolerance under 501(h) before penalties are assessed
- IRS may only revoke 501(c)(3) status for organizations that:
  - Exceed nontaxable limits by 50%
  - Averaged over a four-year period
- No personal penalty for individual managers for exceeding limits

# Lobbying Activity By Non-Profit Organizations

## 501(h) Election

- Must formally elect 501(h) status to take advantage of its protections
- Form 5768 “Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation”
- Non-profit filing requirements

*See: [www.irs.gov/charities/index.html](http://www.irs.gov/charities/index.html)*

# Questions?

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