

advocacy resource

INFLUENCING PUBLIC POLICY IN THE DIGITAL AGE

The Law of Online Lobbying and
Election-related Activities



ALLIANCE^{FOR}JUSTICE

INFLUENCING PUBLIC POLICY IN THE DIGITAL AGE:

The Law of Online Lobbying and Election-related Activities

About the Author

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About Alliance for Justice

Alliance for Justice is a national association of more than 100 organizations dedicated to advancing justice and democracy. For over 30 years we have been leaders in the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil and women's rights, children's, senior citizens' and other groups. Alliance for Justice is premised on the belief that all Americans have the right to secure justice in the courts and to have our voice heard when government makes decisions that affect our lives.

Alliance for Justice is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process. AFJ is based in Washington, D.C., with a satellite office in Oakland, California. Additional information can be found at www.afj.org.

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Foreword

This is an age of vibrant and rapidly evolving communication technologies. It's the era of Facebook and Twitter and YouTube, Websites and blogs, smartphones and tablets. The way we share and consume information, and engage in interaction with others, has been radically altered just within the last few years. That's the case in our private lives, of course, but also increasingly true in the context of how nonprofit organizations communicate and advocate. Change is happening so fast it's hard to keep up. Between the time I write this and the time you read it, almost certainly new ways to communicate will have been brought to the market and injected into our cultural and political systems.

No one had ever heard of—or even imagined—things like Facebook or Twitter when the rules were written that govern advocacy and political activity for nonprofit organizations. But that doesn't mean that the rules don't apply. Today, questions abound about what's permissible for 501(c)(3)s, 501(c)(4)s, and 527s, in the context of social media, blogs, Websites, and the whole host of rapid-fire, far-reaching technologies that now dominate our lives.

This publication was created to address the many questions nonprofit organizations have about advocacy in the new environment of dynamic digital communication. Our hope is not merely to ensure that nonprofit advocates stay within the law, but to demonstrate that robust participation in our nation's democratic process is not just possible, but actually enhanced by new technologies. Our view with electronic advocacy is the same as it is for more traditional forms: the more nonprofits know and understand the rules, the more confident they will be in taking full advantage of their right to be actively and meaningfully engaged in virtually every aspect of our nation's policy and political processes.

Alliance for Justice has a great deal of experience guiding nonprofits and foundations through the uncertainties and opportunities inherent in advocacy and electoral activity. This publication continues our long-standing commitment to provide definitive advocacy tools to the nonprofit community, and complements our other resources and technical services, available online and directly from our expert staff.

We believe *Influencing Public Policy in the Digital Age* has been released at a particularly crucial time because in our world of accelerating change and evolving political and policy environments, advocacy matters now more than ever.

Nan Aron

President

Alliance for Justice

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Introduction

Online communications and social media offer nonprofit organizations new, inexpensive, and easy-to-use tools for connecting with members and the public in a more personal way than ever before. These tools can help small groups wield a powerful megaphone previously available only to the largest organizations, and they can enable members of large organizations to connect with peers across the country on the issues closest to their hearts. For community organizers and communications professionals of every stripe, social media not only provide opportunities for fun innovations, but they have also become as vital a part of their jobs as clipboards, telephones, and walk-lists.

When using the Internet and social media, however, nonprofit organizations find themselves facing an increasing array of laws and regulations. Even before social media emerged, tax requirements imposed by the Internal Revenue Service (IRS), election restrictions administered by the Federal Election Commission (FEC or “the Commission”), and state laws covering electoral and fundraising efforts could feel overwhelming for nonprofit managers. Internet communications and social media add a dizzying spin to the requirements, as nonprofit organizations try to stay at the cutting edge, with the IRS and other agencies taking years to catch up.

This guide aims to answer the questions nonprofit managers most frequently face regarding the Internet and social media. It begins with an overview of the activities that three common types of nonprofit organizations—501(c)(3)s, 501(c)(4)s, and political organizations tax exempt under Section 527—may engage in. Due to the different natures of these activities, we provide separate explanations of the rules applicable to section 501(c)(3) public charities and those applicable to section 501(c)(4)s and political organizations. We also provide answers to frequently asked questions. Those FAQs are grouped both by organizational type, and by social media type, although each section addresses the same FAQs.

Where the IRS or FEC have set rules or have expressed a view on how nonprofits should operate, this guide explains the rule. On questions for which the agencies have not provided pertinent guidance,¹ this guide explains the relevant principles that organizations might apply as they

This guide aims to answer the questions nonprofit managers most frequently face regarding the Internet and social media. Those FAQs are grouped both by organizational type, and by social media type, although each section addresses the same FAQs.

¹ The IRS issues a variety of types of guidance, some of which carry significant legal weight, and some of which are of virtually no legal significance. Regulations interpret and provide direction on how to comply with laws and carry the most legal value of all IRS guidance. Revenue rulings are official conclusions by the IRS regarding specific factual situations and may have some precedential value in situations matching the exact circumstances in which they were issued. Private Letter Rulings are letters issued to a particular taxpayer, interpreting tax law as it applies to that person’s specific set of facts. These letters may only be relied on by the taxpayer who requested the ruling. Technical advice memoranda are guidance issued by the IRS Office of Chief Counsel to other IRS staff in response to specific technical or procedural issues confronted by those staff members in a particular audit or other proceeding; TAMs are very narrowly applicable and of little legal value. Finally, staff may issue memoranda to others in their department regarding particular issues, but these documents carry no legal weight. More information regarding types of IRS guidance is available [here](#).

Similarly, the FEC issues regulations interpreting federal campaign finance laws and providing users with direction on complying with those laws. The Commission also issues Advisory Opinions (AOs), which are official responses to questions relating to the application of federal campaign finance law to a specific factual situation. An AO offers legal protection only to the requester and a person involved in activity “indistinguishable in all its material aspects” from the activity described in the AO. *See* 11 CFR § 112.5.

consider how to engage people and accomplish their missions using the Internet. Additionally, this guide does not attempt to be comprehensive for all rules applicable to the Internet.² Organizations should evaluate these situations in consultation with their legal counsel and proceed based on the organization's own tolerance for uncertainty and risk.

This guide is an evolving work due to the dynamic nature of the topic; if you face questions that this guide does not address, please let us know so that we may answer the question directly for you and so that we may add it in future versions of this guide.

As with the Internet itself, this guide is an evolving work due to the dynamic nature of the topic. We will prepare periodic updates as the IRS and FEC release new guidance. While we cannot address every technological development, we will add sections when nonprofit organizations find themselves facing new questions. Just as social media provide an opportunity for interaction between organizations and their supporters, so too should this guide; if you face questions that this guide does not address, please let us know so that we may answer the question directly for you and so that we may add it in future versions of this guide.

In this guide, the terms *political activity*, *partisan electoral materials*, and *campaign intervention* refer to activities supporting or opposing political candidates or showing a bias toward a candidate. The term *candidate* is defined broadly for IRS purposes, including not just people who have announced an intention to run for office, but also individuals possibly being drafted as candidates. It covers offices at all levels of government, from U.S. president to the local school board. And it covers non-partisan races such as judicial elections. Importantly, the term includes not just *express advocacy* messages (that is, explicit *vote for* and *defeat*-type messages), but also other activities that tend to help or hurt a candidate's chances for election.³

This guide deals only with federal requirements for nonprofit organizations. In addition to the federal requirements, each state has its own campaign finance laws, regulating organizations' activities related to state and local candidates. In states with ballot issues or referenda, section 501(c)(3) organizations may spend funds to support or defeat those measures (subject to their lobbying limits), without facing any tax consequences, but state law may require the organization to register and report its activity. For section 501(c)(4) organizations, the state law may be aligned with federal law, forbidding contributions but permitting independent expenditures. Or the state law may permit independent expenditures and corporate contributions (i.e., direct monetary contributions or in-kind contributions, such as a 501(c)(4) corporation hosting a candidate's ads on the organization's website).⁴ Depending on the state's law, contributions are subject to varying amounts of disclosure and limits. A small number of states have begun addressing the implications of social media, and

² For example, we only touch on the copyright implications of social media, a topic that could fill an entire book. Additionally, this guide is intended to address nonprofits' online activism only; organizations sending commercial email messages, including solicitations for membership, may be covered by federal anti-spam laws and should consult the Federal Trade Commission regulations and their compliance guide for businesses, available [here](#). See 15 U.S.C. § 7702(2)(a); 16 CFR § 316.3, fn. 1.

³ While the IRS has not issued completely clear guidance on what constitutes intervention in a political campaign, the Alliance for Justice has provided a more thorough analysis in its publication, *Rules of the Game*, available [here](#).

⁴ But note that contributions by a section 501(c)(4) organization may be taxable under IRC section 527(f), which imposes a tax on an organization's political spending or its investment income (including interest earned on bank accounts), whichever is less, if either amount is over \$100.

more are likely to do so in the coming years. Maryland, for example, requires disclaimers on an organization’s Facebook or Twitter page if the page contains express advocacy.⁵ For information regarding campaign finance law in a specific state, see the Alliance for Justice state-law resources page available [here](#).

Overview of Nonprofit Tax and Election Rules

Nonprofit organizations are governed by a broad array of federal tax and election statutes, regulations, and court rulings. The laws limit—and even prohibit—certain activities for different types of organizations. Generally, these restrictions fall along the lines of lobbying versus educational activities; political versus non-political activities; and communications with an organization’s members versus communications to the general public. This guide examines how three types of organizations⁶ may leverage the Internet and social media to achieve their goals. The three types of organizations are, as follows:

Contributions to a 501(c)(3) are deductible from a donor’s federal income tax and are not subject to federal gift tax.

- *501(c)(3) Public Charities and Private Foundations*—An organization exempt from tax under Internal Revenue Code (IRC) section 501(c)(3) is required to devote its resources to educational, religious, scientific, or other charitable activities. Contributions to a 501(c)(3) are deductible from a donor’s federal income tax and are not subject to federal gift tax. Public charities may lobby subject to fairly generous limits. Lobbying by a public charity is limited to either an “insubstantial” part of its total activity or to lobbying expenditures that could be as much as 20 percent of its annual budget.⁷ Private foundations are subject to a prohibitive tax on lobbying expenditures.⁸ Lobbying includes activities to influence Congress or a state or local legislature, as well as to support or oppose ballot measures.

A 501(c)(3), whether a public charity or private foundation, is *strictly forbidden* from engaging in any political activity to support or oppose a candidate for political office. There is no exception for *de minimis* amounts of activity, so any political activity using a 501(c)(3) organization’s resources will violate the organization’s tax-exempt status. This extends not only to the organization’s official actions (e.g., a post supporting a candidate and appearing on the executive director’s blog), but potentially also to “unofficial” activity, such as an employee using her organizational computer and email account during her lunch hour to send messages to friends encouraging them to support or oppose a candidate.

⁵ See Code of Maryland Regulations § 33.13.07.02, available [here](#).

⁶ For a more thorough discussion of these three types of organizations—including restrictions on their political activities and principles to consider when jointly operating two or more of these entities—see the Alliance for Justice publication *The Connection*, available [here](#).

⁷ A detailed discussion of the rules governing lobbying by public charities is set out in *Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities*, available [here](#).

⁸ A detailed discussion of the rules governing private foundations is set out in the AFJ publication, *Investing in Change: A Funder’s Guide to Supporting Advocacy*, available [here](#).

A 501(c)(4) may carry out political activities without jeopardizing its tax-exempt status as long as it is engaged **primarily** in non-electoral activities that promote social welfare.

- *501(c)(4) Advocacy Organizations*—An organization exempt from tax under Internal Revenue Code section 501(c)(4) is a social welfare organization that may pursue educational, lobbying, and some limited political activities. However, no limit exists on the amount of lobbying a 501(c)(4) may conduct, including working on the passage or defeat of ballot measures. Contributions to a 501(c)(4) are not tax-deductible and, in some cases, may subject the donor to gift tax. Unlike a 501(c)(3), a 501(c)(4) may carry out political activities without jeopardizing its tax-exempt status as long as it is engaged **primarily**⁹ in non-electoral activities that promote social welfare. Generally, social welfare means promoting social improvement and civic betterment. Education and lobbying on social and economic issues qualify as social welfare activities, but participation in partisan political campaigns does not. A 501(c)(4) may as a **secondary** activity engage in partisan political activities without adversely affecting its exempt status. Such activities must comply with federal or state campaign finance law. In some cases, the 501(c)(4) must pay a tax on funds used for political activities.

- *Political Organizations*—Entities organized under Internal Revenue Code section 527 exist primarily¹⁰ to influence the outcome of elections. These organizations include state and federal PACs, non-PAC political organizations, political parties, and candidates' campaigns. From a tax standpoint, a political organization generally may spend unlimited amounts on political activities and related expenses, but under election law it may be subject to limits on how much may be given to each recipient. Political activities include 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.

Under federal election law, a 527 is a federal PAC if, in a calendar year, it receives contributions aggregating more than \$1,000 to influence federal elections or makes expenditures aggregating more than \$1,000 to influence federal elections.¹¹ A federal PAC may receive contributions of no more than \$5,000 per donor in a calendar year.¹² Depending on their activities to influence state or local elections, section 527 organizations may need to register with election authorities in various states. State-registered PACs may be subject to contribution limits in their respective states.

On the internet, an organization generally remains bound by these restrictions; the laws governing nonprofit activity reach the Web, just as they control other communications channels, such as television, mail, and in-person canvassing. For example, just as a 501(c)(3) may not endorse a candidate at a press conference, the 501(c)(3) also is prohibited from endorsing a candidate on its website.

⁹ No clear test exists for determining when political activity becomes an organization's primary purpose. One approach is to analyze an organization's political expenditures compared to its overall budget. For more on the various factors the IRS may consider in determining an organization's primary purpose, see the Alliance for Justice publication, *The Connection*.

¹⁰ Section 527 organizations may carry out an insubstantial amount of lobbying, but the entity may be subject to tax on activities that do not further its political purposes.

¹¹ 11 CFR § 100.5.

¹² There are no limits on contributions to a so-called "Super PAC," that is, a federal PAC that only makes independent expenditures and does not contribute to candidates.

501(c)(3) Guidance

To comply with the IRC section 501(c)(3) prohibition on political campaign intervention, a public charity must ensure its website and other online activities do not support or oppose candidates, either directly or indirectly. The IRS has provided some guidance to help section 501(c)(3) organizations determine whether certain online activities might violate their tax-exempt status, but this guidance has been quite limited.

“A website is a form of communication.”¹³ It seems obvious, but this commonsense statement is important because it confirms that the IRS generally treats online activities according to the same principles that guide treatment of an organization’s other communications, such as newsletters, TV ads, magazines, radio talk shows, pamphlets, and telephone calls. In this vein, one can extend other IRS guidance to apply to online activities.

A public charity must ensure its website and other online activities do not support or oppose candidates, either directly or indirectly.

The IRS has issued three pieces of guidance related to social media that 501(c)(3)s will find particularly useful. These rulings and memoranda indicate that an organization is responsible for the content on its own website and on the websites to which it links. But the guidance barely scratches the surface. Recognizing the uncertainty facing nonprofit organizations regarding their communications, the IRS asked for public comment on more than two dozen questions related to online activities by tax-exempt organizations. Organizations responded with thoughtfully considered answers that ran for tens of thousands of pages, but the IRS ultimately left its own questions unanswered.¹⁴

◆ Organization’s Own Website

A 501(c)(3) may not use its website to support or oppose candidates, just as its president may not make speeches supporting candidates and its newsletter may not endorse candidates. If a 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.”¹⁵

To illustrate, the IRS provides an example in which a church posts a message on its website urging its members to support one of their fellow parishioners in an upcoming election. By supporting a candidate, the church’s message violates its 501(c)(3) status by intervening in a campaign.

Furthermore, the IRS will examine the context of an organization’s website as a whole, rather than considering whether a particular web page constitutes political intervention. For example, a 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 totally separate part of its website, the organization provides neutral, unbiased information regarding the candidates’ positions on that issue.¹⁶

¹³ Rev. Rul. 2007-41, available at <http://www.irs.gov/pub/irs-drop/rr-07-41.pdf>.

¹⁴ See IRS Announcement 2000-84, 2000-2 C.B. 385, available at http://www.irs.gov/pub/irs-tege/a2000_84.pdf.

¹⁵ Rev. Rul. 2007-41 at p. 11.

¹⁶ Memorandum from Lois G. Lerner, Director, IRS Exempt Organizations Division, April 17, 2008, at 3 (hereinafter “Lerner Memorandum”), available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf.

Example: *PEN Education Fund, a 501(c)(3) organization, publishes a candidate questionnaire on its website and includes the candidates' full responses to the questionnaire. Using neutral language, the questionnaire asked candidates their position on S.B. 1080, a bill to repeal the Clean Air Act. Elsewhere on the website, PEN Education Fund says S.B. 1080 would be devastating for the environment and people's health, and it says blocking S.B. 1080 is the organization's top priority. The IRS might assert that PEN Education Fund has intervened in a campaign by informing the public where candidates stand on an issue and providing the organization's view of the "correct" position to take on that issue.*

Under certain circumstances it is possible to do a joint 501(c)(3)/501(c)(4) website.

◆ **Sharing Website with Related 501(c)(4) Organization**

An important issue to note is that a 501(c)(3) organization and its related 501(c)(4) organization may avoid certain problems by having separate websites. Under certain circumstances it is possible to do a joint 501(c)(3)/501(c)(4) website. First, if the website is owned by the 501(c)(3) organization, and the 501(c)(4) does not engage in any political activity, the 501(c)(4) may pay to post material on the 501(c)(3)'s website. Second, if the website is owned by the 501(c)(4), and the 501(c)(3) organization pays to post material on the site, that activity may be permissible. However, if the website is owned by the 501(c)(3), and the 501(c)(4) conducts political activity, then political material on the joint website may be attributed to the 501(c)(3), resulting in a violation of the 501(c)(3)'s tax status.

In 2009, the IRS found a 501(c)(3) organization had engaged in prohibited political activity when its website housed pages for its related 501(c)(4) organization.¹⁷ In that situation, the 501(c)(3) organization maintained a website, with the 501(c)(4)'s pages nested within that site. The layout and design of all pages on the site were the same. The 501(c)(3) logo appeared on every page of the site; the 501(c)(4) pages *also* bore the logo of the 501(c)(4) organization. Endorsements of political candidates appeared on the 501(c)(4) pages. Despite the fact that the 501(c)(4) paid a proportionate share of the website costs under a cost-sharing agreement between the two organizations, the IRS found that the 501(c)(3) had engaged in political intervention by hosting the endorsements on the website.

◆ **Links to Other Websites**

Not only are organizations responsible for the content on their websites, but they are responsible for their web links, according to the IRS. An organization may not use web links in a manner that supports or opposes candidates. To determine whether a 501(c)(3) is engaging in impermissible political activity by linking from its website to another website, the IRS will look at the context of the organization's link. If a 501(c)(3) organization links to a 501(c)(4) website that does not include any political content, the 501(c)(3)'s links will not be a problem.

¹⁷ IRS TAM 200908050, available at <http://www.irs.gov/pub/irs-wd/0908050.pdf>.

Only in very narrow situations may a 501(c)(3) link to a website with political content. The facts and circumstances considered by the IRS will include the language that appears on the 501(c)(3)'s website describing the link; whether the 501(c)(3)'s links treat all candidates equally; whether the link serves a proper tax-exempt purpose (such as nonpartisan public education); and the directness of the links between the organization's website and the web page containing material supporting or opposing a candidate.¹⁸ The IRS "will pursue the case if the facts and circumstances indicate that the section 501(c)(3) organization is promoting, encouraging, recommending or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues. Again, analysis of the context around the link is a key factor."¹⁹

To determine whether a 501(c)(3) is engaging in impermissible political activity by linking from its website to another website, the IRS will look at the context of the organization's link.

A 501(c)(3) may link to a website with electoral content if there is no indication that the organization is presenting the link because it supports the electoral message, and the organization's webpage is separated from the electoral content on the other site by a sufficient number of intervening links. The IRS has not said how many links constitute sufficient separation, but "electronic proximity—including the number of 'clicks' that separate the objectionable material from the 501(c)(3)'s website—is a significant consideration."²⁰

The IRS provides two examples of situations where a 501(c)(3) may link to a website with political content:²¹

- **Content Surrounding the Link**—A 501(c)(3) may link to a candidate's website from an unbiased, nonpartisan voter guide that satisfies the IRS's rules relating to voter guides²² if the guide includes all candidates and the links are presented in a consistent, neutral manner, such as including text that reads, "For more information on Candidate X, you may consult [URL]." In this case, the links are provided for a proper tax-exempt purpose—educating voters—without supporting or opposing any candidate.
- **"Multiple Clicks"**—By way of example, the IRS says a hospital website may link to a newspaper's website, even though the newspaper's website includes the paper's editorial endorsements of candidates, as long as the hospital is linking to material related to the hospital's tax-exempt mission (in this case, an article praising the hospital's treatment program for a particular disease), there are no links from the hospital website to the endorsements, and there is no other context related to the links to indicate the hospital was supporting or opposing any candidate.

After establishing a link, an organization has an ongoing duty to monitor it. If an organization links to an external website, and that external website later changes its content to be political, the 501(c)(3) organization may be held liable for conducting political activity, even though the link was

¹⁸ Rev. Rul. 2007-41 at 11-12.

¹⁹ Lerner Memorandum at 2.

²⁰ *Ibid.*

²¹ Rev. Rul. 2007-41 at 12.

²² See Rev. Rul. 78-248, available at <http://www.irs.gov/pub/irs-tege/rr78-248.pdf>.

permissible at the time it was posted. For this reason, the IRS says the organization has a duty to monitor the sites to which it links because the content on those sites may change over time, and the organization must adjust its links if the content on that site becomes impermissibly political.

It is important to note that the IRS issued a memorandum prior to the 2008 election saying that, “at this time,” it would not pursue enforcement cases involving a link between a 501(c)(3)’s

Online political activity by a section 501(c)(4) organization or a PAC will be treated for tax purposes just as political speech in other media is treated.

website “and the *home page* of a website operated by a related section 501(c)(4) organization.”²³ This exception is useful because many 501(c)(3) organizations want to link to their affiliated 501(c)(4) organization. Previously, some organizations removed any links between a 501(c)(3) website and a related 501(c)(4) website during election seasons, when the 501(c)(4) website touted the organization’s endorsement or provided other election-related advocacy. Under the IRS memorandum, the 501(c)(3) may maintain its link to the 501(c)(4) home page—but *only* to the

home page. Links to other sections of a related 501(c)(4)’s website may jeopardize the 501(c)(3)’s tax status if the 501(c)(4) website contains political advocacy. It is unclear whether this exception would apply if the 501(c)(4) posts its endorsements on its home page. Another unknown is whether this exception applied only to the 2008 election cycle or whether it remains in effect for future cycles.

501(c)(4) and PAC Guidance

Online political activity by a section 501(c)(4) organization or a PAC will be treated for tax purposes just as political speech in other media is treated. As the IRS has said, “A website is a form of communication.”²⁴ From a tax perspective, a 501(c)(4) may support or oppose candidates to the extent it wishes, so long as political activity does not become the organization’s primary purpose, but its expenditures on political activity may be subject to federal tax. A PAC, on the other hand, may engage in unlimited political activity, with no tax consequences.

A 501(c)(4) with a related 501(c)(3) organization should be sensitive to the restrictions faced by its sibling organization. Importantly, if the 501(c)(4) engages in political activity, the 501(c)(3) organization may face certain risks if the two organizations share a website, as described above. In a case where a 501(c)(3) website housed pages for its related 501(c)(4) organization, and the 501(c)(4) pages endorsed candidates, the IRS attributed the political material to the 501(c)(3) organization that owned the website.²⁵ The fact that the 501(c)(4) paid a proportionate share of the website costs under a reimbursement agreement between the two organizations was not enough to demonstrate to the IRS that the material belonged to the 501(c)(4), rather than to the 501(c)(3) organization.

²³ Lerner Memorandum at 3 (emphasis added).

²⁴ Rev. Rul. 2007-41.

²⁵ IRS TAM 200908050.

◆ FEC Internet Regulations

Constraints on online political activity for 501(c)(4)s and PACs arise in the context of campaign finance laws. Corporations, including nonprofit corporations, may not make contributions to federal candidates or to PACs, although, under the Supreme Court’s decision in *Citizens United v. FEC*, they may spend unlimited amounts on independent expenditures, which are payments for communications that are not coordinated with candidates or their campaigns. PACs, on the other hand, are established specifically for the purpose of making political contributions and expenditures.

For individuals, bloggers, and organizations, the FEC’s Internet regulations offered clarity and a measure of freedom.

Emerging online technology has presented challenges for the Federal Election Commission. After a decade of issuing advisory opinions piecemeal on Internet-related questions, the FEC promulgated Internet regulations in 2006. In its rulemaking, the FEC set out “to remove potential restrictions on the ability of individuals and others to use the Internet as a low-cost means of civic engagement and political advocacy.”²⁶ “The vast majority of Internet communications are, and will remain, free from campaign finance regulation.”²⁷ The FEC sought to encourage people to use the Internet as a vehicle for political communications, likening its low cost to a speaker standing on “a soapbox in a public square.”²⁸

For individuals, bloggers, and organizations, the FEC’s Internet regulations offered clarity and a measure of freedom. Federal PACs²⁹ do not receive the same treatment afforded to individuals, bloggers, and 501(c)(4) organizations by the FEC Internet regulations. Regardless of the medium, PACs must disclose all of their spending on political activity. Additionally, federal PACs must put disclaimers on all websites they make available to the general public and on all emails containing more than 500 substantially similar messages.³⁰

◆ Volunteer Activity

Federal law limits the amount of money a person may contribute to a political candidate, but the law allows individuals to spend as much time as they want on personal volunteer activities. Under the FEC’s rules, activity by an individual is not reportable as a “contribution” or as an “expenditure” as long as the person is not compensated for his or her efforts.³¹ Just as a person may spend hundreds of hours walking door-to-door encouraging local residents to vote for or against a candidate, a person may engage in unlimited online activity supporting or opposing federal candidates, and their activity will not trigger registration or contribution limits. On their own time,³² individuals may set

²⁶ Internet Communications, 71 Fed. Reg. 18589, 18589 (Apr. 12, 2006).

²⁷ *Ibid.* at 18596.

²⁸ *Ibid.* at 18594.

²⁹ Internet communications by a nonfederal IRC section 527 organization that does not meet the definition of “political committee” under 11 CFR 100.5 are subject to the rules applicable to Internet communications by an IRC section 501(c)(4) organization.

³⁰ 11 CFR § 110.11(a)(1).

³¹ See 11 CFR §§ 100.94, 100.155.

³² Additionally, if individuals are paid only a “nominal fee” for blogging or other on-line activities, their services are not treated as a contribution or expenditure. See 11 CFR § 100.94(e)(1); 100.155(e)(1).

up websites and blogs supporting or opposing candidates (and may comment on others' blogs), send emails, or conduct other activities advocating for or against candidates, and may reproduce materials from candidates' websites. Individuals may coordinate these activities with federal candidates and political parties, and the individuals' costs are not treated as contributions or expenditures. This rule applies regardless of who owns the computer.³³ In addition, these exceptions extend to groups of

The FEC's Internet regulations allow employees of a corporation to make "occasional, isolated, or incidental" use of corporate computers (as well as other equipment and facilities) to conduct individual volunteer activity in connection with a federal election.

individuals who have decided to incorporate for liability purposes so long as the corporation (1) is wholly owned by one or more individuals; (2) engages primarily in Internet activities; and (3) does not derive a substantial portion of its revenues from sources other than income from its Internet activities.³⁴

◆ Use of Organization's Computers and Equipment

A section 501(c)(4) nonprofit corporation may not allow its property—including its computers—to be used to support a federal candidate if the activity would be a prohibited in-kind contribution to the candidate.³⁵ However, the FEC's Internet regulations allow employees of a corporation to make "occasional, isolated,

or incidental" use of corporate computers (as well as other equipment and facilities) to conduct *individual* volunteer activity in connection with a federal election. The employee's time will not be considered a contribution by the organization, nor will the corporation's decision to allow its equipment to be used for such purposes.³⁶

"Occasional, isolated, or incidental" means the employee's use during or after working hours does not prevent the employee from completing his or her normal amount of work. Furthermore, the corporation may not condition the availability of the equipment on its being used for political activity, or on support for or opposition to any particular candidate or political party. There is no limit on the number of hours an employee may engage in individual political activity on the Internet,³⁷ so long as

- the employee completes the normal amount of work that person is paid for or is expected to perform;
- the use does not increase the overhead or operating costs of the corporation; and
- the employer does not coerce the employee into performing the activity.³⁸

³³ Under the tax laws, however, computers for a 501(c)(3) organization may not be used for any political activity, presumably even by employees on lunch breaks or after work hours.

³⁴ 11 CFR §§ 100.94, 100.155.

³⁵ Note, however, that a nonprofit corporation exempt from tax under section 501(c)(4) may use its resources to make unlimited express advocacy communications with its members or executive or administrative personnel, and those payments are not considered contributions or expenditures. See 11 CFR §§ 100.134, 114.1(a)(2)(i). Also, a 501(c)(4) organization—but not a 501(c)(3)—may use its property for independent expenditures, provided those activities are conducted independent of any candidate or campaign. See *Citizens United v. FEC*, 558 U.S. 50 (2010); IRC § 501(c)(3).

³⁶ Keep in mind, though, that tax law prohibits political intervention by 501(c)(3) organizations; the fact that the FEC permits occasional use of a corporation's computer does not enable a charitable organization to get around the IRS prohibition for 501(c)(3)s.

³⁷ In contrast, the safe harbor for non-Internet related activities is limited to one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours. See 11 CFR § 114.9(a)(1).

³⁸ 11 CFR § 114.9(a)(2)(ii).

Some states may follow a similar rule, so non-501(c)(3) organizations should consult state law to determine whether employee use of work computers will result in a corporate contribution.

◆ Paid On-line Ads

As an exception to the latitude given to Internet communications, the FEC treats paid on-line advertising just as it does TV or radio ads. “[C]ommunications placed for a fee on another person’s web site” are subject to disclaimer requirements similar to those imposed on TV and radio ads.³⁹ This treatment is consistent with the philosophy of the FEC’s Internet regulations:

The FEC treats paid on-line advertising just as it does TV or radio ads.

Just as the FEC decided not to regulate speech akin to a soapbox speechmaker, it analogizes paid online advertising to purchases of TV airtime.⁴⁰ Paid Internet advertising includes banner ads, pop-up ads, paid streaming video, and directed search results.

This means

- The costs of a paid ad on the Internet that expressly advocates the election or defeat of a federal candidate must be paid for by a permissible source, such as a federal political committee (PAC) or an individual other than a foreign national. Corporations (other than 501(c)(3)s) and labor unions may pay for them only if they are not coordinated with candidates or political parties.
- Ads paid for by a corporation as an independent expenditure must include a disclaimer with the corporation’s name and a statement that the ad is not authorized by any candidate or candidate’s committee. The FEC granted a narrow exception to Google AdWords,⁴¹ so those advertisements do not need a disclaimer, even if they support or oppose federal candidates.⁴²
- If a federal PAC purchases an ad on a website, the ad must have a disclaimer indicating the committee’s name and address and whether or not the ad is authorized by a candidate or candidate’s committee.

³⁹ See 11 CFR §§ 100.26, 110.11.

⁴⁰ 71 Fed. Reg. at 18590.

⁴¹ Google AdWords are four-line advertisements that generally appear to the right side of a user’s search results on Google. The first line is a 25-word headline, followed by two lines of text and then a URL, each of which may be up to 35 characters. Advertisers target AdWords based on the user’s search terms.

⁴² FEC Advisory Opinion 2010-19 (Google), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108>.

Frequently Asked Questions

Websites

Q May our 501(c)(3) website provide links to candidates' websites?

A A 501(c)(3) website may link to candidates' websites only if the links are presented in a neutral, unbiased manner that includes all candidates for a particular office.⁴³ If the 501(c)(3) website indicates it is providing a link to signal its support for the candidate, that would constitute prohibited campaign intervention by the organization.

Example: *On its website, PEN Education Fund, a 501(c)(3) organization, may post an unbiased, nonpartisan voter guide and include a link to each candidate's website. The links are presented on a consistent, neutral basis, with text saying, "For more information on Candidate X, click here." Similarly, PEN Education Fund could post a list of all candidates for a given office, with links to each candidate's campaign website, as long as the context does not indicate support or opposition to any candidate.*

*PEN Education Fund may **not** post links only for selected candidates, with text that says, "To learn more about our favorite candidates, click here."*

Q May a 501(c)(3) website include candidate endorsements?

A No. An organization's website must follow the same rules that apply to the other communication channels used by the organization. Furthermore, a 501(c)(3) website may not indirectly provide information about favored candidates, such as by providing links where the context makes it clear that it is encouraging users to learn about specific candidates. Presenting links in a neutral manner, however, is permissible, such as on a webpage that provides links to all candidates for a given office, without indicating an organizational preference for any candidate.

Q May our 501(c)(3) website include candidates' answers to our issue questionnaire?

A Yes, but the organization should take care not to indicate that it views one candidate's answers to be the "right" ones or the "wrong" ones. The IRS has said 501(c)(3) organizations may

⁴³ See Rev. Rul. 2007-41, example 19.

publish candidate questionnaires if they select issues solely on the basis of their importance and interest to the electorate as a whole; if the questionnaire and any subsequent voter guide do not contain any biases or show preference for any candidate; and as long as the organization publishes all candidates' responses in their entirety.⁴⁴ If an organization publishes answers to its questionnaire online, it may include links to each candidate's website.⁴⁵

The IRS might find even an unbiased, neutral questionnaire to be problematic if an organization posts the candidates' responses on its website, and other sections of the organization's website advocate for a particular position on the issues mentioned in the questionnaire.⁴⁶ The IRS might argue that by including the organization's own viewpoint on the website, the organization is telling readers the "correct" position on each issue, and from that readers could then infer which candidates the organization would support.

Q May a c3 and a c4 share a website?

A It depends on which organization owns the website. Under certain circumstances it may be possible to do a joint 501(c)(3)/501(c)(4) website, such as if the 501(c)(4) does not engage in political activity, or if the website is owned by the 501(c)(4) and the 501(c)(3) organization pays to post material on the site. Generally, though, if the 501(c)(4) has any partisan electoral content, it will be safer for the 501(c)(3) organization not to share a website. Maintaining separate websites helps to demonstrate that the two are separate organizations. In no case should partisan electoral material be included on a 501(c)(3) website, unless the material is so clearly distinguished as belonging to another entity that it is impossible to attribute the content to the 501(c)(3).

Q May the website of a 501(c)(3) organization link to its affiliated 501(c)(4)'s website?

A A 501(c)(3) organization must be careful about its links. During the 2008 election, the IRS said it would not pursue enforcement cases involving a link between a 501(c)(3)'s website "and the *home page* of a website operated by a related section 501(c)(4) organization." It is not clear how long this policy will remain in effect, and whether it would apply if the 501(c)(4) home page listed the organization's candidate endorsements.

When linking from a 501(c)(3) website to an affiliated 501(c)(4) website—or vice versa—it may be helpful to have a pop-up window appear, emphasizing to users that they are entering the site of a separate organization.

⁴⁴ Rev. Rul. 78-248.

⁴⁵ Rev. Rul. 2007-41 at example 19.

⁴⁶ See Lerner Memorandum at 3.

Q May a 501(c)(3) organization sponsor an ad that doesn't support a candidate, but the ad sends people to a website that does?

A If a 501(c)(3) organization is prohibited from doing something directly, it is prohibited from doing it indirectly. The 501(c)(3) may not avoid the prohibition on political intervention simply by engaging in a two-step process of directing people to another site that contains endorsements. This applies in the context of links from one website to another, and from one type of media to another, such as mailers or ads directing people to a website.

Example: *PEN Education Fund, a 501(c)(3) organization, sponsors a radio ad about clean air in the weeks before an election. The ad does not mention any candidates or the election. It ends with, "To learn who's protecting clean air in our area, go to www.CleanAirNow.org." If that website includes candidate endorsements or biased information about the candidates—even if the website is maintained by another organization—the IRS may view the ad's sponsor as engaging in impermissible political activity.*

Q May a 501(c)(4) announce an endorsement on its website?

A Yes. If the cost is paid for by the 501(c)(4), and not by a PAC, then the associated expenses may be taxable for the organization. (A 501(c)(4) must pay tax on its political expenditures or its investment income, whichever is less, to the extent they exceed \$100.) Note that prior to the U.S. Supreme Court's decision in *Citizens United v. FEC*, corporations were prohibited from conducting independent expenditures in federal elections and in some states' elections. Since the Supreme Court's decision in *Citizens United v. FEC*, all domestic corporations and various other entities may engage in independent expenditures—that is, activities supporting or opposing candidates that are not undertaken with the candidate's recommendation, suggestion, direction, control, or cooperation. In federal elections and in approximately half of the states, corporations may not contribute to candidates, so their endorsements must be conducted as independent expenditures.

In contrast to communications on a publicly available website, the rules are different in some elections if the endorsement is on a webpage, access to which is limited only to the organization's members. In these elections (including federal elections and most states), the material on that page may be coordinated with candidates. This spending must be disclosed for federal races, but many states do not require reporting of spending on activity directed only at members. For more information on state requirements, see the [Alliance for Justice state law resources](#). An election agency may consider a website to be restricted to members if it is protected by a password only given to members, or if the URL or link to the webpage is included only in an email sent to members, but not reachable by links from public portions of the organization's website.⁴⁷

⁴⁷ See FEC Advisory Opinions 1997-16 (Oregon Natural Resources Council) and 2000-07 (Alcatel USA).

Under the FEC’s Internet regulations, it is possible a corporation may be allowed to coordinate with a candidate regarding an endorsement posted *publicly* on its website (i.e., not password protected for members’ eyes only). Posting a statement on a corporation’s own website does not fit within the FEC definition of a “public communication,” so the activity does not need to be conducted as an independent expenditure. However, the costs related to the posting presumably would need to be reported by the endorsed candidate, and such costs would be an in-kind contribution by the corporation, which is prohibited under federal law. The FEC’s Internet regulations do not resolve this internal conflict,⁴⁸ and the Commission has not yet addressed the issue in an advisory opinion.

Under federal law, a website endorsement does not need a disclaimer stating who paid for it, unless the organization purchases an online advertisement on another person’s website.

Lobbying

Q May a 501(c)(3) public charity or 501(c)(4) organization use social media for lobbying?

A Yes. Social media provide myriad inexpensive opportunities to influence legislation. Organizations may leverage the low cost of emails, web postings, Facebook, and other social media to maximize their lobbying influence.

Section 501(c)(3) public charities may lobby, but lobbying may not be more than an insubstantial part of the organization’s activity. For an objective determination of whether lobbying is a substantial part of an organization’s activity, charities may elect to use the “section 501(h) expenditure test” to measure their lobbying. More information regarding the section 501(h) expenditure test and the lobbying limits imposed on public charities is available in the Alliance for Justice publication, *Worry-Free Lobbying for Nonprofits*, available [here](#). The low cost of social media tools means a section 501(c)(3) organization may send numerous email alerts, status updates, or other efforts without exceeding the limits on its lobbying activities under the 501(h) expenditure test.

In addition to the limits imposed on “direct lobbying” communications to legislators and others, tax law imposes far stricter limits on “grassroots lobbying” aimed at the public.⁴⁹ Communications on Facebook or a publicly accessible website that ask people to contact their legislators to support or oppose a particular bill⁵⁰ will be considered grassroots lobbying. Under tax law, communications to an organization’s members are treated as direct

⁴⁸ See 71 Fed. Reg. at 18596.

⁴⁹ See IRC §§ 501(h), 4911(c). Grassroots lobbying is communications to the public referring to specific legislation, reflecting a view on the legislation, and encouraging the recipients of the communication to take action with respect to the legislation. Treas. Reg. § 56.4911-2(b)(2).

⁵⁰ Communications that do not mention a particular bill may still be considered lobbying under IRS regulations. The IRS defines “specific legislation” as including legislation that has already been introduced into a legislative body; ballot initiatives, referenda, and constitutional amendments being circulated among voters for their signatures, as well as, in certain circumstances, proposed legislation. See IRC § 56.4911-2(d)(1).

lobbying, rather than as grassroots lobbying, meaning that organizations may engage their members in more lobbying activities.⁵¹ Posts on Facebook, Twitter, and the like, which are not limited to an organization's members, will be treated as grassroots lobbying even if the publicly accessible post encourages only the organization's members to engage in lobbying. Organizations that want to limit a lobbying communication to their own members, so the communication will be treated as direct lobbying, should use email, text messages, or password-protected websites, rather than a publicly accessible website.

Example: *An organization posts a statement on Senator Doe's Facebook Wall, stating, "Sen. Doe, support your constituents by voting to pass S.B. 321 to expand health care." This communication would likely be treated as direct lobbying by the IRS, because it is a communication directly to Senator Doe on a communication vehicle managed by her staff.*

If the statement instead said, "Citizens of Maine, contact Sen. Doe and tell her to vote for S.B. 321," then the cost would be grassroots lobbying, because it is a communication that refers to specific legislation, reflects a view on that legislation, and encourages recipients other than the decision-maker to take action with respect to the legislation. Note that it likely would be considered grassroots lobbying regardless of whether the organization posted the statement as its own status update or posted it on Sen. Doe's own Wall.

It is important to keep in mind that the IRS may view certain communications about legislation or issues as political advocacy rather than lobbying.⁵² A tweet, text, or email urging people to contact a particular senator about a certain piece of legislation may be viewed by the IRS as a political communication. Factors the IRS will examine include whether the communication mentions a candidate shortly before an election, whether it is targeted to voters in that election, whether it mentions a candidate's position on an issue that is a hot topic in the campaign, and whether the communication is tied to a specific upcoming legislative vote on the issue.

Example: *PEN Education Fund, a 501(c)(3) organization, posts the following Tweet a week before an election: "Tell @Sen.Smith thx 4 being a great clean-air champ for the past 6 yrs., and say you want him to vote for the Clean Air Bill next year." Clean air has been a key campaign issue distinguishing the two candidates, and the clean air bill will not be voted on before the election. The IRS may view this tweet as political advocacy rather than lobbying.*

⁵¹ Treas. Reg. § 56.4911-5.

⁵² Rev. Rul. 2007-41 at 8.

Blogs

Q May staff or guest bloggers support candidates on our 501(c)(3)'s blog? What about supporters or opponents who add comments to blog posts?

A Treatment of blog comments is a difficult issue for nonprofit organizations. Blogs are an inexpensive way to broadcast an organization's message to a large audience, but monitoring a large and active blog can consume an enormous amount of staff resources, making this otherwise cheap resource too expensive to be cost-effective. The IRS has not answered this question, leaving organizations with little to help guide their decisions about how to approach blog comments. In the absence of IRS guidance, organizations may consider the following principles.

Staff postings: Because staff-written postings carry the imprimatur of the organization, they are likely to be attributed to the organization. This is the case even if the staff member writes the posting on his own time, without using organizational resources.⁵³ Therefore, postings by staff on a 501(c)(3) website may not support or oppose candidates, or in any way violate the prohibition on campaign intervention. Staff postings on a 501(c)(4) website are permissible, so long as they comply with applicable campaign finance laws. Staff of a 501(c)(3) may post political content on a 501(c)(4) website if the two organizations have a written cost-sharing agreement in place, under which the 501(c)(4) pays for the staff member's time, ensuring that no 501(c)(3) funds are used for political advocacy.

Guest postings: It is unclear how the IRS would treat posts written by guest bloggers (i.e., individuals who are not employees or organization officials) on an organization's website. If the IRS follows precedents in which it has permitted 501(c)(3) organizations to serve as a public forum for promoting ideas,⁵⁴ it will not treat guest bloggers as speaking on behalf of the organization, provided the blog includes a disclaimer stating that the views expressed are those of the guest bloggers and not necessarily those of the organization, that the organization does not endorse any political candidates, and that the commentaries are presented as a public service in the interest of informing the public.

It remains possible, however, that the IRS may treat a guest blogger's post as being speech by the organization. In a ruling relating to Internet activity, the IRS stated, "If an organization posts something on its web site 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."⁵⁵ This ruling did not include caveats saying a web posting would be acceptable if it contained appropriate disclaimers.

User Comments: Comments by the general public posted on an organization's blog likely will not be attributed to an organization if the organization allows comments to be posted

⁵³ See Rev. Rul. 2007-41, example 4.

⁵⁴ See Rev. Rul. 72-513, Rev. Rul. 74-574, Rev. Rul. 86-95.

⁵⁵ Rev. Rul. 2007-41 at 11.

regardless of political viewpoint. To avoid having comments attributed to the organization, the blog should include a prominent disclaimer stating that the views expressed are those of the people making the comments and not necessarily those of the organization, that the organization does not endorse any candidates, and that the commentaries are presented as a public service in the interest of informing the public. An organization may delete comments that contain offensive language. However, if it deletes only some comments based on their political content and not all comments with political content, the organization may open itself to an accusation that it is promoting one political message over another.

Email Lists

Q May a 501(c)(3) let a 501(c)(4) or a candidate use its email list?

A A 501(c)(3) organization may not provide an email list for free to candidates, political parties, or even a politically active 501(c)(4) organization because to do so would allow 501(c)(3) resources to subsidize the activities of the candidate, party, or 501(c)(4). If the 501(c)(3) makes a list available for rent at fair market value to anyone who wants to rent it, then the charity may make its list available on that basis to 501(c)(4)s, candidates, and political parties.⁵⁶ A 501(c)(3) may not allow a candidate or political party to use its lists, even with fair compensation, unless the charity also is willing to make its lists available to all candidates and to all political parties. To ensure the list is equally available to all candidates, the 501(c)(3) organization should inform the other candidates that the list is available. Income from list rentals is generally not subject to unrelated business income tax (UBIT) because it is exempt as royalty income. For more information, see *The Connection*.

Q May a 501(c)(4) organization let a candidate or political party use its email list?

A Because an organization's email list has value, giving a list to a candidate is a contribution. Where the law allows corporate contributions, a 501(c)(4) may give its email or other membership list to a candidate. In jurisdictions that prohibit corporate contributions (e.g., federal elections and in many states), the candidate or political party must pay the 501(c)(4) organization fair market value for using the list. Payment for the email list must be made to the 501(c)(4) in advance. Otherwise, the organization may be found to have made an in-kind contribution to the candidate or party. Unlike a 501(c)(3) organization that rents its lists to candidates, a 501(c)(4) organization may choose to rent, sell, or give its list only to the candidates it supports; a 501(c)(4) organization does not need to make the list available to everyone who requests it.

⁵⁶ See Judith E. Kindell and John Francis Reilly, *U.S. Internal Revenue Service, Exempt Organizations Continuing Professional Education Text FY 2002, Election Year Issues (2002)*, 383-84, available at <http://www.irs.gov/pub/irs-tege/etopic02.pdf>.

Q What are the rules for moderating an email listserv?

A No clear rules have been set by the IRS or FEC regarding moderation of email listservs. Depending on how the listserv is operated, the principles regarding their management may follow those applicable to membership communications or to blogs.

For listservs open only to members, postings should be treated as membership communications.⁵⁷ This means a 501(c)(4) organization may make unlimited communications to support or oppose candidates, participants in the listserv may send candidate-related messages without restriction, and those messages may be coordinated with the candidate or his campaign. A 501(c)(3) organization should not allow its staff members to send emails to the listserv supporting or opposing candidates, as these may be attributed to the organization and considered by the IRS to be impermissible campaign intervention. Members' candidate-related emails may be defensible if the organization allows comments to be posted regardless of political viewpoint and if the organization periodically sends list members a disclaimer stating that the views expressed are those of the individuals making the comments and not necessarily those of the organization, that the organization does not endorse any candidates, and that the commentaries are presented as a public service in the interest of informing the membership.

Listsers open to the public or to people who are not members of the organization should be treated somewhat differently. Staff-written emails on a 501(c)(4) listserv may support or oppose candidates only to the extent that they are written as independent expenditures or—where permissible—as in-kind corporate contributions from the organization. Participants on a 501(c)(4)'s public listserv may be permitted to post emails supporting or opposing candidates in three situations: 1) if listserv expenses are allocated as in-kind contributions to the candidate; 2) if the expenses are an independent expenditure for the candidate; or, potentially 3) if the organization includes proper disclaimers stating that the views expressed are those of the individuals making the comments and not necessarily those of the organization. A 501(c)(3) should not allow its staff to post comments supporting or opposing candidates on a public listserv, and list participants should receive a disclaimer informing them that the organization does not support or oppose candidates and that participants should not post material supporting or opposing candidates.

Social Networking Sites

Q Do the IRS and FEC rules apply to social networking sites like Facebook, Twitter, YouTube, and MySpace?

A Social networking is uncharted territory for the IRS and FEC, but the agencies' broader rules most likely apply to social networking sites just as they do to other communications

⁵⁷ The analysis in this section applies only to federal elections and elections in states whose campaign-finance laws do not treat communications with an organization's members as a contribution. The analysis differs for state laws that do not include a membership communications exception.

channels. Organizations should assume that 501(c)(3)s may not use social networking sites to intervene in elections and that 501(c)(4) political activity must follow the relevant state or federal laws regarding corporate campaign contributions and independent expenditures.

Q What are the rules for “friending,” “liking” or “following” politicians?

A While no specific “rules” regulate the friending or following of politicians, tax law and IRS regulations provide some principles to guide organizations. Section 501(c)(3) organizations may not intervene in elections, such as by showing bias against or preference for particular candidates.⁵⁸ By taking action to friend or like a person on Facebook, the organization is signaling its approval of that person. If a 501(c)(3) organization links to the profile of a political candidate as a Facebook “friend” or someone they “like,” the organization’s action likely shows a preference for that candidate over others. Whether the IRS would view “following” a person on Twitter as indicating approval for that person is unclear; organizations may follow someone simply to monitor what that person is saying, without passing judgment on the speaker.

Depending on the circumstances, the analysis may be different if the organization friends or likes the official government profile created by a public official, rather than that of a candidate. It may be preferable to connect to an official’s public profile rather than to a campaign profile. In that situation, the IRS might view the organization as signaling approval for the politician’s official actions but not passing judgment on the politician’s election campaign, which may carry less risk. The analysis would be based on the specific facts and circumstances of the situation, such as the timing in relation to an election, whether the organization likes all members of a particular committee or delegation, comments by the organization on Facebook related to that official, and other factors. However, because friending or liking a public official may be viewed as akin to an endorsement of that person, it is possible the IRS would view any such action by a 501(c)(3) organization to be an impermissible political endorsement, even when done to a politician’s official government page.

A 501(c)(4) organization, because it may engage in political activity, is not bound by these restrictions. A 501(c)(4) may friend, follow, or like any candidate. The costs involved (which are likely to be de minimis) may be subject to the jurisdiction’s campaign finance laws and may need to be reported as an in-kind contribution or an independent expenditure.

Q Does a 501(c)(3) have to reject politicians’ requests to “friend” or “follow” the organization? What if they say they “like” the organization?

A Generally, a 501(c)(3) organization should treat public officials and candidates no differently than it treats other Internet users. If an organization accepts all friend requests and all Twitter followers, it reasonably may accept public officials and candidates, too, without bias for or against any candidates or parties. By simply following the organization’s policy of

⁵⁸ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii); Rev. Rul. 2007-41.

accepting all Facebook and Twitter requests, these instances differ from situations where the organization itself is making an affirmative step to state an organizational preference for a particular officeholder or candidate by reaching out to friend or follow the candidate. If a candidate likes an organization on Facebook, the organization has no control over that statement, just as it would not have any control over a candidate standing up at a debate and verbally praising the organization and saying he likes it. The IRS analysis would be on the organization as the speaker, and whether the organization is endorsing the candidate, not the other way around.

Example: *The IRS may view PEN Education Fund, a 501(c)(3) organization, to have engaged in prohibited campaign activity if it “Likes” city council candidate Jim Jones. However, if Jones decides to like PEN Education Fund from his Facebook page, and PEN Education Fund does not actively engage with Jones, the organization should not be seen as engaging in campaign activity.*

A 501(c)(4) group, in contrast, may “Like” candidate Jones. It may also post a status update that announces, “Great news! We’ve been ‘Liked’ by Jim Jones, a city council candidate who’s a long-time hero on our issues.”

Note: *Twitter etiquette at one time encouraged users to return the favor to their followers by following them back. However, following someone may send a different message than passively accepting that person as a follower. If the IRS views following someone on Twitter to be an endorsement of that person’s views, then a 501(c)(3) organization that follows a candidate is impermissibly intervening in an election, even if the organization is doing it only as a polite gesture after the candidate had first followed the organization. Without clear guidance from the IRS, it is difficult to know whether the IRS would make distinctions between liking a candidate on Facebook and following him or her on Twitter. The safest route for 501(c)(3) organizations is to buck Twitter etiquette and not follow any candidates.*

Q May we talk about candidates in tweets, texts, and status updates?

A An organization should discuss officeholders and candidates in tweets, texts, and status updates only to the extent they would do so in other communications channels. Section 501(c)(3) organizations may tweet, send texts, or post status updates about public officials, as long as those messages do not intervene in the officials’ elections. For example, a 501(c)(3) organization could use Twitter and Facebook to rally its supporters to take action on grassroots lobbying,⁵⁹ providing the names of particular legislators to contact, but only if such activity is truly lobbying in nature and is not political activity in disguise.⁶⁰ If the message is focused only on the legislation and does not communicate support for or

⁵⁹ Section 501(c)(3) organizations may conduct no more than an insubstantial amount of lobbying. See I.R.C. §§ 501(h), 4911.

⁶⁰ Cf. Rev. Rul. 2004-6, available at <http://www.irs.gov/pub/irs-drop/rr-04-6.pdf>.

opposition against the candidate, the IRS may consider the message to be lobbying and not political intervention.

Example: *A section 501(c)(3) organization should be able to post the following tweet as a grassroots lobbying expenditure, without it being viewed as political activity: “Call or email @SenJones today; he’s key on health care bill, and we need him to vote yes. Vote is tomorrow, so it’s urgent! 202-224-6441.”*

A 501(c)(3) organization should not, however, tweet, text, or post information about candidates that shows a bias or preference concerning the candidates. For example, re-tweeting a candidate’s announcement for office or about an upcoming rally could be viewed as akin to favoring that candidate. Similarly, tweeting or posting a link to a newspaper’s endorsement of a candidate would be viewed as recommending to the organization’s followers that they should read (and, presumably, agree with) the newspaper’s endorsement.

The facts and circumstances of a particular message from a 501(c)(3) organization will determine whether it communicates permissible issue advocacy or impermissible political intervention.⁶¹

A 501(c)(4) organization, in contrast, may use Facebook, Twitter, YouTube, and all other communications channels at its disposal to conduct unlimited lobbying, issue advocacy, and political campaign activity, as long as political activity does not become its primary purpose. For political activity, the relevant federal or state campaign finance law may require reporting of the costs, either as an in-kind contribution to the candidate (where corporate contributions are permitted), or as an independent expenditure. Under federal law, the status updates and Facebook pages of corporations do not need disclaimers because the organization does not need to pay Facebook for its service. Paid advertisements placed on Facebook do, however, need a disclaimer identifying the corporation that paid for them. Under certain state laws regulating social media, such as Maryland’s, a Facebook page may require a disclaimer.

Q What should we do if a candidate or supporter posts something political on our Facebook wall?

A If a candidate or other person posts a political message on the Facebook wall of a 501(c)(3) organization, or in response to the organization’s status update, the safest approach is either to delete that message or to post a follow-up from an organizational staff member stating that statements expressed by others on the wall do not necessarily reflect the organization’s views and that the organization does not support or oppose candidates. The organization

⁶¹ Rev. Rul. 2007-41 at 8-9.

should take a consistent approach—either deleting the post or following it with a disclaimer statement—regardless of the content of a particular message. For example, if you delete messages posted by candidates who generally oppose your organization, do not simply post a disclaimer after messages from candidates who generally support your organization; apply your policy consistently regardless of a comment’s content. As a prophylactic measure, a 501(c)(3) organization may place a general disclaimer on its Facebook wall or info page stating that the organization does not endorse candidates or otherwise intervene in political campaigns, and asking people not to post comments on the organization’s wall that support or oppose candidates. However, the efficacy of such a disclaimer is unknown.

A 501(c)(4) organization, on the other hand, may post political content in its status updates and may allow others to post political comments on its wall or in response to a status update. Further, because it may engage in political activity, the 501(c)(4) may delete comments opposing the organization’s political positions, while featuring those supporting the organization’s endorsed candidates. The time spent on express advocacy related to candidates is reportable as an independent expenditure or as an in-kind contribution, subject to federal or state campaign finance law, and it counts against the organization’s “primary purpose” test. Under federal law, the status updates and Facebook pages of corporations do not need disclaimers because the organization does not need to pay Facebook for its service. Paid advertisements placed on Facebook do, however, need a disclaimer identifying the corporation that paid for it. Under certain state laws regulating social media, such as Maryland’s, a Facebook page may require a disclaimer.

Q What should we do if a candidate or another person tweets something about our 501(c)(3) organization that’s political, or associates a political hashtag with our name?

A An organization cannot control what others say about the organization in tweets, so there is no legal obligation to respond. The IRS likely would not say a 501(c)(3) organization has intervened in a political campaign in this situation because the organization is not responsible for the tweets. This situation is akin to a letter to the editor in which a candidate mentions the organization: The organization may respond to clear its name or to correct the record by informing the public that it does not support or oppose candidates, but it will not be penalized if it chooses to ignore the offending statement.

Q May we treat our Facebook friends or other social network followers as “members?”

A No. Both the IRS and the FEC treat an organization’s communications to its members more leniently than it does communications to non-members. Both the IRS and the FEC have specific regulations defining who qualifies as a member.

IRS regulations permit an organization to treat certain communications to its members as non-lobbying activity, even though they would be lobbying if made to non-members,⁶² or as direct lobbying rather than grassroots lobbying. For lobbying purposes, the IRS defines “member” as a person who pays dues or makes a contribution of more than a nominal amount; makes a contribution of more than a nominal amount of time; or is one of a limited number of “honorary” or “life” members who have more than a nominal connection with the electing public charity and who have been chosen for a valid reason.⁶³ The IRS has given no indication what constitutes volunteering “more than a nominal amount of time” for an organization.

The FEC allows corporations to make unlimited express advocacy communications to their members and to coordinate those communications with candidates—activity that would be illegal if the corporation were communicating with non-members.⁶⁴ The FEC defines “member” as someone who either has a significant financial attachment to the organization; pays annual dues at least annually, of a specific amount set by the organization; or has a significant organizational attachment to the organization, which includes affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization.⁶⁵

Merely being Facebook friends with an organization, signing up for its email list, or being connected through another social network does not satisfy either the IRS or the FEC membership definition.

Q Our 501(c)(3) organization’s employees are grassroots organizers, and we encourage them to use their personal Facebook account to publicize work activity. How should they segregate their personal political activity and their non-political work activity?

A To the extent an organization is paying persons to post work-related information on social networks, the activity likely will be attributed to the organization and must comply with the organization’s tax-exempt status. If the employees are identifying themselves as employees (e.g., “Come to my event Tuesday night”), the online activity should comply with the organization’s tax status. Additionally, if the employees posted the information only because they are employees, the post may be viewed as part of their work and should comply with the organization’s tax status. If the employees use a social networking tool both for personal and work-related activity, but the predominant use is for the organization, then it may be safest for any posts related to the employees’ personal political views to contain a disclaimer that the post is in their personal capacity only. If the employees primarily use their Facebook account for personal purposes and also occasionally use it for work purposes, then their political posts should be written in such a way that the IRS (and other readers) would not mistake the content as being work-related.

⁶² Treas. Reg. § 56.4911-5.

⁶³ Treas. Reg. § 56.4911-5(f)(1).

⁶⁴ 2 U.S.C. § 441b(b)(2)(A).

⁶⁵ 11 CFR § 100.134(f).

Q The president of our organization has a Facebook page and a Twitter account, but our staff manages them and adds much of the content. May they “friend” and “like” politicians, or tweet about a candidate’s latest speech?

A In a situation where the organization’s staff is maintaining the president’s Facebook page and Twitter account, those activities should be treated as organizational activities. The Facebook page or the Twitter account in this situation is no different from a speech or op-ed column by the president on behalf of the organization (and likely written by organization staff). If the staff time to maintain the Facebook page or Twitter account is paid for by a 501(c)(3) organization, the president’s statements on the page or account should not take positions in elections—just as the president’s speech or op-ed column would not. The president could use his or her 501(c)(3) Facebook page to “friend” or “like” the official government page of a public official, but the president should not connect to a candidate site if the organization is using 501(c)(3) funds to maintain the president’s Facebook page.

If the account is treated as a 501(c)(4) activity, then the President may engage in political activity such as announcing the organization’s endorsements or touting a position taken by a politician. However, the applicable state or federal laws regarding contributions, coordination, and independence must be followed. For example, if the president is coordinating with a candidate, the staff time involved with the president’s tweets must be allocated as a contribution to the candidate whom they benefit.

Media sites

Q May we use photos from candidates’ websites on our web pages?

A A 501(c)(3) may not use a candidate’s photo to show support for or opposition to his or her candidacy. However, a 501(c)(3) may use candidate photos in presenting a neutral, unbiased list of all candidates.

A potential problem arises, however, in using photographs taken from a candidate’s own website, Flickr feed, Facebook page, or other site. Under federal campaign finance regulations, an organization that distributes or republishes materials produced by a campaign may be making a contribution to that candidate.⁶⁶ The FEC has struggled with the question of whether using a photo from a candidate’s website constitutes republication. Four of the current six FEC commissioners, in various situations, have said that copying a photo from a candidate’s website does not constitute an in-kind contribution.⁶⁷ The matter is not settled, however, and various state laws may treat this activity as an in-kind contribution.

⁶⁶ 11 CFR § 109.23(a).

⁶⁷ See Statement of Reasons of Commissioners Petersen, Hunter and McGahn, MUR 5996 (“[W]e do not believe the republication of photographs from a candidate’s website, particularly ‘head shot’ photos, constitutes republication of campaign materials for purpose of satisfying the content prong of the Commission’s coordination regulations”), available at <http://www.fec.gov/members/mcgahn/sor/mur5996.pdf>; and Statement of Reasons of Commissioners von Spakovsky and Weintraub, MUR 5743, available at <http://eqs.sdrdc.com/eqsdocsMUR/00005AE4.pdf>.

Furthermore, an organization should be aware that using photographs copied from the Internet, without permission of the photographs' owner, may violate copyright law. You should check whether the photographs are being published pursuant to a Creative Commons license, which states specifically the conditions under which someone can use a copyrighted work. You should also check the terms and conditions of the website on which the photograph is located. Often, the terms and conditions will dictate how a user can use content from the particular website. It is also possible that you may have a reasonable "fair use" defense if you were to use the photograph without permission. You should consult legal counsel if you think you will need to rely on "fair use." (Please note, however, that works of the federal government are not protected by copyright and are free for the taking.)

It is also important to consider whether the organization needs permission from any identifiable people in the photographs. Generally, people have a right to control the use of their image for "commercial" purposes. A 501(c)(3) or 501(c)(4) organization's purposes are likely not to be considered "commercial," but be aware that an organization will need to obtain permission to use a person's image if your use is commercial in nature.

Q What rules do we need to consider when we host videos on our website?

A When deciding whether to host a video on its website, an organization should consider the content of the video and its copyright protections. From a content perspective, an organization may host a video if the content is consistent with the organization's tax status. Just as a section 501(c)(3) organization may not distribute pamphlets with express advocacy, its website may not host videos containing express advocacy—whether those videos are produced by the organization or whether they embed a link from another organization or from a news source.

A section 501(c)(4) organization considering whether to host an express-advocacy video must determine whether doing so would constitute an in-kind contribution or an independent expenditure. In a federal election, for example, hosting a video created by a candidate on a 501(c)(4) website might be viewed as "republication" of the candidate's materials, in which case it would be a coordinated in-kind contribution even if the organization did not communicate with the candidate or campaign regarding the video. Corporations are prohibited from making in-kind contributions to candidates under federal law. However, if the organization posted a link to the video on the candidate's website, rather than hosting the video on the organization's own site, this might be considered an independent expenditure by the 501(c)(4) organization if no coordination had occurred.

From a copyright perspective, it is very important to determine whether an organization is permitted to copy a third party's video and embed it on the organization's website. Check the website's terms and conditions, which usually state what one can and cannot do with content from the site. Some sites include a "Share" button, which may reasonably be interpreted as granting permission to a user to share the particular video in the manner that is intended. A use that is greater than what is authorized (either implicitly or explicitly) would constitute copyright infringement.

Absent permission to copy, distribute, and republish a video, the only safe course of action is to include a link from your website to the website that hosts the video. This way you are not violating copyright law and you are making it clear to the users that they are leaving your website and going to a different website. Embedding a video without permission of the copyright owner would constitute copyright infringement and should not be done.

Disclaimers

Q When do we need a line stating “Paid for by ____,” or other disclaimer language?

A Federal PACs—A website created by a federal PAC, and available to the general public, must include a disclaimer stating that it was paid for by that PAC. If the website was authorized by a candidate, the disclaimer must state that fact. If the website is independent of a candidate, the disclaimer must state the full name and permanent street address, telephone number, or URL of the PAC and state that the communication was not authorized by any candidate or candidate’s committee.

State PACs—Disclaimer requirements vary by state. To learn more, see the Alliance for Justice State Law Resources Page <http://www.afj.org/for-nonprofits-foundations/state-resources/>) or consult a state’s election authority.

Paid Web Ads Mentioning a Candidate—As discussed above, communications supporting or opposing federal candidates are regulated by the FEC if they are placed for a fee on another’s website. Advertisements paid as independent expenditures⁶⁸ must state the full name of the organization that paid for the ad; give its permanent street address, telephone number, or URL; and state that the communication was not authorized by any candidate or candidate’s committee.

The FEC granted an exception to Google AdWords, saying that AdWords advertisements supporting or opposing federal candidates do not need a disclaimer.⁶⁹ AdWords contain a headline, followed by two lines of text and a URL. Some FEC commissioners approved the exception based on the fact that AdWords contain a URL, which, they said, provides users with notice regarding the sponsor of the advertisement akin to the notice provided in a disclaimer. Other FEC commissioners took the view that AdWords are so small that they fit within the exceptions for small items and/or the exception for items on which placing a disclaimer was impracticable.

Web Videos Mentioning a Candidate but *Not* Placed for a Fee—If an organization other than a federal PAC creates a video mentioning a federal candidate and posts the video on its own website or on YouTube or makes it available through some other online vehicle—but doesn’t pay those other websites to post it as an ad—the video does not need any disclaimer. Depending on the content, though, the costs associated with the ad may be reportable as an independent expenditure, and coordination with candidates may be prohibited.

⁶⁸ A nonprofit corporation may not pay for communications that are authorized by a candidate and appear on a publicly available website.

⁶⁹ FEC Advisory Opinion 2010-19.

Solicitations by 501(c)(4)s, PACs, and Certain Other Organizations (but not 501(c)(3)s)—Any fundraising solicitations must include a disclaimer that meets the following four requirements:⁷⁰

- § The solicitation includes whichever of the following statements the organization deems appropriate: “Contributions or gifts to [name of organization] are not deductible as charitable contributions for federal income tax purposes,” “Contributions or gifts to [name of organization] are not tax deductible,” or “Contributions or gifts to [name of organization] are not tax deductible as charitable contributions”;
- § The statement is in at least the same size type as the primary message stated in the body of the letter, leaflet, or ad;
- § The statement is included on the message side of any card or tear-off section that the contributor returns with the contribution; and
- § The statement is either the first sentence in a paragraph or itself constitutes a paragraph.

Text Messages—In a 2002 advisory opinion,⁷¹ the Federal Election Commission ruled that text messages that were limited to 160 characters per message did not need disclaimers. This opinion was limited to the facts of the situation presented to the FEC. The FEC might not extend this disclaimer exception to text messages with an unlimited character length.

Employees’ Personal Activities

Q May our employees use their work email accounts to send their friends messages supporting candidates?

A A 501(c)(3) may not allow its employees to use the organization’s property to conduct political activity.

For a 501(c)(4) organization, on the other hand, the answer depends on the jurisdiction in which the candidates are running. For federal elections, employees may use their work email accounts to send political emails, as long as this activity is only “occasional, isolated, or incidental” and is conducted in their individual capacity.⁷² The emails should make clear that the employees are not speaking in their capacity as a corporate employee. “Occasional, isolated, or incidental” means the activity does not prevent the employee from completing his or her normal amount of work. Furthermore, the corporation must apply the policy evenly, without favoring employees whose messages support or oppose any particular candidate or political party. If the employee’s activity adds to the corporation’s costs, the employee must reimburse the organization, so that corporate funds are not subsidizing political activity.

⁷⁰ IRC § 6113; *see also* IRS Notice 88-120, available at <http://www.irs.gov/charities/article/0,,id=96112,00.html>. IRC section 6113(c)(1) applies to solicitations “made in written or printed form, by television or radio, or by telephone.” Although the Code does not explicitly mention online communications, it seems likely the IRS would view electronic communications to be “in written or printed form.” Similarly, the IRS could argue that an online video is akin to a communication made “by television,” although that may be a more difficult case to prove.

⁷¹ FEC AO 2002-09 (Target Wireless).

⁷² *See* 11 CFR § 114.9(a).



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