OVERVIEW OF PRESENT-LAW RULES AND DESCRIPTION OF CERTAIN PROPOSALS RELATING TO DISCLOSURE OF INFORMATION BY TAX-EXEMPT ORGANIZATIONS WITH RESPECT TO POLITICAL ACTIVITIES

Scheduled for a Hearing
before the
Subcommittee on Oversight
of the
House Committee on Ways and Means

Prepared by the
Staff of the
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INTRODUCTION

The Subcommittee on Oversight of the House Committee on Ways and Means has scheduled a hearing for Tuesday, June 20, 2000, on proposals for enhanced public disclosure relating to political activities of tax-exempt organizations.

This document,[1] prepared by the staff of the Joint Committee on Taxation, contains an overview of the present-law rules relating to political and lobbying activities of tax-exempt organizations, a description of the present-law disclosure rules applicable to such organizations (including a brief overview of the rules under the Federal Elections Campaign Act of 1971), and descriptions of certain proposals.

[1] This document may be cited as follows: Joint Committee on Taxation, *Overview of Present-Law Rules and Description of Certain Proposals Relating to Disclosure of Information by Tax-Exempt Organizations With Respect to Political and Lobbying Activities* (JCX-59-00), June 19, 2000.

I. EXECUTIVE SUMMARY

Overview

Present-law section 501(c) provides for twenty-seven different categories of nonprofit organizations that generally are exempt from Federal income tax. Different rules apply to lobbying and political campaign activities of such tax-exempt organizations depending upon the category of section 501(c) under which the organization is described.

Code section 501(c)(3) provides tax-exempt status to certain nonprofit entities organized and operated exclusively for charitable, religious, educational, or certain other purposes. Organizations described in section 501(c)(3), which generally are referred to as "charities," are classified either as public charities or private foundations. In addition to the tax-exempt status provided to the organization, charitable contributions to such organizations are tax deductible to the donor for Federal income, estate, and gift tax purposes.

Among the other types of organizations described in section 501(c) are (1) social welfare organizations (sec. 501(c)(4)), (2) labor organizations (sec. 501(c)(5)), and (3) trade associations or civic leagues (sec. 501(c)(6)). These entities and other tax-exempt organizations that are not described in section 501(c)(3) (i.e., non-charities) generally are not eligible to receive contributions that are deductible as charitable contributions to the donor for Federal income, estate, or gift tax purposes, but may be deductible under section 162 as a business expense.

Section 527 provides a limited tax-exempt status to "political organizations," meaning a party, committee, association, fund, account, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures (or both) for an "exempt function." These organizations are generally exempt from Federal income tax on contributions they receive, but are subject to tax on their investment income and certain other income. Donors are exempt from gift tax on their contributions to such organizations. For purposes of section 527, the term "exempt function" means: "the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." Thus, by definition, the purpose of a section 527 organization is to accept contributions or make expenditures for political campaign (and similar) activities.

Overview of present-law Federal tax rules governing political and lobbying activities of tax-exempt organizations

The Federal tax rules applicable to political campaign and lobbying activities of tax-exempt organizations depend on the nature of the organization and the nature and extent of the activities. There is no bright-line test for determining whether particular activities are political campaign activities, lobbying activities, or some other activities (e.g., educational activity.)

Section 501(c)(3) organizations

Section 501(c)(3) organizations are not entitled to tax-exempt status if they participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office. In theory, no amount of political campaign activity is permitted by such organizations. In addition, each political expenditure by a section 501(c)(3) organization is subject to penalty excise taxes of up to 100 percent of the amount of the expenditure.

Section 501(c)(3) organizations are not entitled to tax-exempt status if any substantial part of their activities is carrying on propaganda, or otherwise attempting, to influence legislation (commonly referred to as lobbying). Public charities may engage in some lobbying activities, provided that such activities are not substantial. In contrast, private foundations are subject to the restriction that lobbying activities -- even if an insubstantial part of their activities -- may result in the foundation being subject to penalty excise taxes, unless certain exceptions apply.

There is no statutory definition of lobbying under present law. However, Treasury regulations provide that an organization is not entitled to tax-exempt status under section 501(c)(3) due to its lobbying activities if a substantial portion of its activities are: (1) contacting, or urging the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (2) advocating the adoption or rejection of legislation. Thus, attempts to influence legislation under section 501(c)(3) include directly contacting members of a legislative body (and their staffs) to propose, support, or oppose legislation (so-called "direct lobbying"), and urging the public to contact legislative bodies, or otherwise attempting to influence public opinion, with respect to legislation (so-called "grass roots lobbying"). Certain types of activities are specifically excepted from the definition of lobbying under present law. These activities include: (1) making available the results of nonpartisan analysis, study, or research; (2) providing technical advice or assistance to a government body or committee in response to a written request; (3) self-defense direct lobbying; (4) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization or such members (other than communications that involve a call to action by members of the organization); and (5) any communication with a government official or employee other than a communication that would constitute the influencing of legislation or the principal purpose of which is to influence legislation.

Because a section 501(c)(3) organization may engage in unlimited educational activities, the distinction between political activities, lobbying activities, and permissible educational activities becomes important. However, there is no bright-line test under present law for determining when activities are political campaign intervention, lobbying, or educational. Whether an organization is participating or intervening, directly or indirectly, in a political campaign depends upon all of the facts and circumstances of each case. Issues often arise with respect to dissemination of so-called voter education materials, such as voter education guides and other materials disseminated to the public.

For example, in one ruling, the IRS concluded that a voter guide that (1) contained voting

records of all Members of Congress on "major legislative issues involving a wide range of subjects," (2) did not imply approval or disapproval of any Members or their records, and (3) was compiled annually and made available to the public was a permissible activity for a section 501(c)(3) organization.[2] On the other hand, the IRS concluded in the ruling that an organization primarily concerned with land conservation issues that presented incumbents' voting records only on issues of importance to the organization and widely distributed the guide among the electorate during an election campaign was engaged in prohibited political campaign intervention even though the guide contained no express statements in support of or in opposition to any candidate. Thus, the IRS looked at both the format and the content of the guides to determine whether they were educational or constituted impermissible political campaign intervention.

In another ruling, the IRS stated that, even in circumstances in which the format and content of a voter guide were not neutral (i.e., the facts were similar to the voter guide by an organization interested in land conservation issues in the example above), the timing and nature of the distribution of the guide indicated that it was not intended to be impermissible political campaign intervention.[3] In this case, the timing of the distribution was not geared to any Federal election and did not target distribution to any particular areas where elections were occurring. Instead, the voting record compilation were to be compiled in the organization's newsletter and distributed only to regular subscribers who numbered only a few thousand nationally.

Other organizations described in section 501(c)

Tax-exempt organizations other than those described in section 501(c)(3) generally are permitted to engage in political campaign activities. For many of these organizations, political activities are inconsistent with the purpose for which the organization was established; thus, most such organizations do not engage in any significant political activities. However, for those organizations (such as a social welfare organization described in section 501(c)(4), a labor organization described in section 501(c)(5), or a business league or trade association described in section 501(c)(6)) that may engage in significant political campaign activities, such activities cannot be the primary activities of such an organization.

Even though a non-501(c)(3) tax-exempt organization that engages in political campaign activities will generally retain its tax-exempt status so long as such activities are not the primary means of accomplishing its purposes, such activities nonetheless will result in the organization being subject to tax under section 527(f) on the lesser of the amount of its investment income or the amount expended on political activities. However, a non-501(c)(3) organization may establish a separate segregated fund, which may be treated as a separate organization under section 527(f)(3), so that the expenditures and investment income of the fund will not be attributed to the sponsoring organization.

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[2] Rev. Rul. 78-248, 1978-1 C.B. 154.

[3] Rev. Rul. 80-282, 1980-2 C.B. 178.

Non-section 501(c)(3) tax-exempt organizations are not subject to any specific provision that restricts their lobbying activities. In general, the only limit imposed by the Internal Revenue Code is that the lobbying activities must be germane to the accomplishment of the organization's exempt purposes. For some organizations, such as social welfare organizations or business leagues, lobbying may be the organization's primary, or even sole, activity. It is not uncommon for organizations such as social welfare organizations, labor organizations, and business leagues to conduct substantial lobbying as their primary activity. However, because the line between lobbying activities and political activities is not always clear, some self-described lobbying activities (i.e., attempts to influence the selection of an individuals to a non-elective public office) potentially could lead the IRS to treat these as political activities taxable under section 527(f).

Section 527 organizations

Section 527 exempts from taxation certain "exempt function income" (i.e., contributions, dues, proceeds from political fundraisers or the sale of campaign materials, and proceeds from bingo games) but only to the extent such income is segregated for use only for an "exempt function" of a political organization. Thus, no entity-level income tax is imposed on contributions (and certain other "exempt function" income) received by a political organization which are used for electioneering or other "exempt function" activities (as defined in section 527).[4] However, a political organization's investment income and any other non-exempt function income (e.g., income from events that are not political in nature),[5] minus expenses directly connected with the production of such income,[6] is subject to tax at the highest corporate income tax rate (currently 35 percent).

In a series of recent private letter rulings ("PLRs"), the IRS has recognized the "political

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[4] Expenses incurred in conducting an "exempt function" activity under section 527 may be either directly or indirectly related to such activity, including expenses related to activities engaged in between elections to support the next political campaign and fundraising activities. See Treas. Reg. sec. 1.527-2(c). As one example, Treasury regulations provide that expenses for voice and speech lessons to improve a candidate's skills are for an "exempt function" (Treas. Reg. sec. 1.527-2(c)(5)(iii)). *See also* Rev. Rul. 79-13, 1979-1 C.B. 208 (expenses for voter research and public opinion polls are "exempt function" expenses under sec. 527, provided that there is a nexus with an election). An "exempt function" also generally includes an activity which is in furtherance of the process of terminating a political organization's existence. *See* Treas. Reg. sec. 1.527-2(c)(3).

[5] *See* Treas. Reg. sec. 1.527-3(d); Rev. Rul. 80-103, 1980-1 C.B. 120 (income of political organization from sale of art reproductions was not exempt function income for purposes of sec. 527).

[6] *See* Treas. Reg. sec. 1.527-4(c). In computing taxable income, a political organization is allowed a specific deduction of $100 under section 527(c)(2)(A).

organization" status under section 527 of organizations that are specifically prohibited (either by their charter or by a resolution adopted by their board of directors) from expressly advocating the election or defeat of any particular candidate. In these private letter rulings, the organizations represented that their primary activity would be conducting voter education efforts and grass roots lobbying (commonly referred to as "issue advocacy"), the content, timing, and geographic targeting of which was intended to influence recipients to favor the organization's view when voting for candidates. The IRS ruled that, because such biased voter education activities constituted political campaign intervention under long-standing interpretations of section 501(c)(3), such activities were, in turn, "exempt function" activities under section 527.[7] The organizations themselves sought section 527 status, apparently to clarify that their donors would be immune from Federal gift tax liability, while simultaneously preserving the organization's ability to assert (for non-tax purposes) that their implied approval or disapproval of candidates was beyond the reach of the Federal election laws. This ruling again illustrates the difficulty in categorizing the nature of these activities.

Overview of present-law filing and disclosure requirements for tax-exempt organizations and section 527 organizations

Recognition of tax-exempt status

Under present law, section 501(c)(3) organizations generally are required to notify the IRS of their tax-exempt status by filing an application for recognition of tax-exempt status.

Most non-section 501(c)(3) organizations are not subject to the Code's mandatory notice requirements and, therefore, are not required to notify the IRS that they are seeking recognition of their tax-exempt status.[8] Such organizations may voluntarily file exemption applications in order to establish their qualifications for tax exemption with the IRS.

Section 527 organizations are subject to no notification requirement when they are formed and there is no separate application for recognition of status as a section 527 organization. However, an organization wishing to receive confirmation of its status as a section 527 organization may request a written determination from the IRS in the form of a private letter ruling.

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[7] In PLR 9808037 (Nov. 21, 1997), the IRS stated: "It follows that any activities constituting prohibited political intervention by a section 501(c)(3) organization are activities that must be less than the primary activities of a section 501(c)(4) organization, which are, in turn, activities that are exempt functions for a section 527 organization." See also PLR 1999-25051 (March 29, 1999).

[8] Section 501(c)(9) voluntary employees' beneficiary associations and section 501(c)(17) employee supplemental unemployment compensation benefits trusts are required to apply to the IRS for recognition of tax-exempt status. Sec. 505(c).

Annual filing requirements

Tax-exempt organizations generally are required to file an annual information return with the IRS. An organization that has not received a determination of its tax-exempt status, but that claims tax-exempt status under section 501(a), is subject to the same annual reporting requirements and exceptions as organizations that have received a tax-exemption determination.

Most tax-exempt organizations are required to file annually Form 990 (Return of Organization Exempt From Income Tax). Section 501(c)(3) organizations that are classified as public charities must file Form 990 and an additional form, Schedule A, which requests information specific to section 501(c)(3) organizations. A non-section 501(c)(3) organization also is required to file Form 1120-POL (U.S. Income Tax Return for Certain Political Organizations) if the organization's political expenditures and net investment income both exceed $100 for the year. If a non-section 501(c)(3) organization establishes and maintains a section 527(f)(3) separate segregated fund, the fund is required to file Form 1120-POL.

Public charities described in section 501(c)(3) are required to disclose their lobbying expenditures on Schedule A of Form 990 and to maintain records that will enable them to calculate and report these expenditures. Non-section 501(c)(3) organizations are required to provide annual information disclosure to members (sometimes referred to as "flow-through information disclosure") estimating the portion of members' dues allocable to political campaign activities, as well as any lobbying activities. Disclosure is not required for an organization that: (1) incurs only a de minimis amount (i.e., $2,000 or less) of in-house political campaign and lobbying expenditures during the taxable year, (2) elects to pay a 35-percent proxy tax on its political campaign and lobbying expenditures incurred during the taxable year, or (3) establishes that substantially all of its dues monies are paid by members not entitled to deduct such dues in computing their taxable income.

Section 501(c) organizations are required to disclose on their annual returns (Form 990) for each year the total amount of direct or indirect political expenditures made by the organization during the year. In addition, the annual return requires section 501(c) organizations to disclosure whether the organization filed a Form 1120-POL for the year, which is required if the organization's political expenditures and net investment income both exceed $100 for the year. If a non-section 501(c)(3) organization establishes and maintains a section 527(f)(3) separate segregated fund, the fund is required to file Form 1120-POL.

Section 527 political organizations are not required to file Form 990 annually. If the section 527 political organization has taxable income, it is required annually to file Form 1120-POL; similarly, if the political organization does not have taxable income, the Form 1120-POL is not required to be filed.

Because it is an income tax return, the Form 1120-POL requires information related to the amount of income and expenses of the filing organization (or separate segregated fund) for the year. Thus, the Form 1120-POL does not contain information relating to contributors to the

organization or the specific activities of the organization (or fund).

Disclosure requirements

Under present law, section 501(c) organizations are required to make a copy of their application for recognition of tax-exempt status (and certain related documents) and their annual information return (Form 990 or Form 990-PF) available for inspection by any individual during regular business hours at the organization's principal office or any regional or district office that has three or more employees. Organizations are not required to disclose an application for tax exemption filed by the organization unless the IRS responded favorably to the application. The required disclosure does not include Form 990-T, Exempt Organization Business Income Tax Return, or Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations. In addition, tax-exempt organizations are not required to disclose the names of donors. Annual information returns must be made available for a three-year period beginning with the due date for the return (including any extension of time for filing).

The Form 1120-POL filed by a section 527 organization is not publicly disclosable under present law.

Overview of disclosure requirements under Federal election law

In general

The Federal Election Contributions Act ("FECA") was enacted to regulate communications made in connection with Federal elections by imposing restrictions on eligible contributors, dollar contribution limits for individual contributors, and reporting and disclosure requirements. The courts have generally held that only communications that contain express words advocating the election or defeat of a political candidate (so-called "express advocacy") are subject to the requirements of FECA. Communications that fall outside of the FECA definition of "express advocacy" are commonly referred to as "issue advocacy." Historically, most communications by tax-exempt organizations and section 527 organizations were subject to the FECA disclosure requirements because they constituted express advocacy.

Under the FECA, individuals are permitted to contribute up to $1,000 to a candidate per election and up to $20,000 per year in contributions to the federal accounts of a national party committee. In addition to these specific limits, individuals have an aggregate annual Federal contribution limit of $25,000. Separate contribution limits also apply to multi-candidate political action committees ("PACs"), other political committees, and party committees.

Reporting requirements

The FECA requires each treasurer of a political committee to sign and file reports of receipts and disbursements.

During any calendar year in which there is a regularly scheduled election or nomination for election, a political committee that is the principal campaign committee of a congressional candidate is required to file a pre-election report, a post-election report, and additional quarterly reports. In any other calendar year, a congressional candidate's committee is required to file semi-annual reports.

During any calendar year in which a general election is held, the principal campaign committee of a presidential candidate generally is required to file monthly reports if the committee receives contributions aggregating $100,000 or more or makes expenditures aggregating $100,000 or more, or anticipates receiving such contributions or making such expenditures. If a presidential candidate's principal campaign committee is not required to file monthly reports due to the level of actual or anticipated contributions and expenditures, the committee generally must file the same pre-election, post-election, and quarterly reports required for congressional candidates. In a calendar year in which a general election is not held, a presidential candidate's committee is required to file either monthly reports or quarterly reports.

Political committees other than authorized committees of a congressional or presidential candidate are required to file either monthly reports or pre-election, post-election, and quarterly reports.

The items that each report must disclose include the following:

(1) The total amount of all receipts and the total amount of all receipts in each of several categories, including contributions, transfers, and loans from committees, individuals, the candidate, and political party committees.

(2) The identification of contributors, transferors, and recipients of disbursements of more than $200.

(3) The total amount of all disbursements in excess of $200, and all disbursements in several categories, including expenditures made to meet candidate or committee operating expenses, transfers to other committees authorized by the same candidate, and loans and repayment of loans.

(4) The amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.[9]

In addition to reports by political committees, the FECA requires every person other than a political committee who makes independent expenditures in an aggregate amount or value in

[9] 2 U.S.C.S. 434(b).

excess of $250 during a calendar year to file a statement that contains (1) the identity of the contributor, the date and the amount of all contributions received by such person, (2) the identity of the recipient of the independent expenditure, the date, amount, and purpose of the expenditure, and an indication of whether the independent expenditure is in support of, or in opposition to, the candidate involved, (3) a certification whether or not such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate, and (4) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure. Any independent expenditure aggregating $1,000 or more made after the 20th day, but more than 24 hours before any election must be reported within 24 hours after such independent expenditure is made. The statement concerning such an expenditure must contain the identity of the recipient of the independent expenditure, the date, amount, and purpose of the expenditure, and an indication of whether the independent expenditure is in support of, or in opposition to, the candidate involved. FECA requires the FEC to prepare indices that set forth, on a candidate-by-candidate basis, all independent expenditures separately made by or for each candidate and to periodically publishing such indices on a timely pre-election basis.

II. OVERVIEW OF PRESENT-LAW FEDERAL TAX RULES GOVERNING POLITICAL AND LOBBYING ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS

A. Present-law Restrictions on Political and Lobbying Activities by Section 501(c) Organizations

In general

Present-law section 501(c) provides for twenty-seven different categories of nonprofit organizations which generally are exempt from Federal income tax.[10] Different rules apply to lobbying and political campaign activities of such tax-exempt organizations depending upon the category of section 501(c) under which the organization is described. The restrictions on an organization's lobbying and political campaign activities generally become more stringent as the Federal tax benefits potentially available to the organization or to the organization's donors increase.

Section 501(c)(3) provides tax-exempt status to certain nonprofit entities organized and operated exclusively for charitable, religious, educational, or certain other purposes, provided that no part of the net earnings of the organization inure to the benefit of any private shareholder or individual. Organizations described in section 501(c)(3), which generally are referred to as "charities," are classified as either public charities or private foundations.[11] In addition to the tax-exempt status conferred on organizations described in section 501(c)(3), charitable contributions to such organizations are tax-deductible to the donor for Federal income, estate,

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[10] These "tax-exempt organizations" generally are exempt from Federal income tax on income derived from activities substantially related to their exempt purposes and on their investment income. However, such organizations generally are subject to tax on any income derived from business activities that are regularly carried on and not substantially related to their exempt purposes. Secs. 511-514.

[11] Sec. 509(a). Private foundations are defined under section 509(a) as all organizations described in section 501(c)(3) other than the organizations granted public charity status by reason of (1) being a specific type of organization (i.e., churches, educational institutions, hospitals and certain other medical organizations, certain organizations providing assistance to colleges and universities, or a governmental unit); (2) receiving a substantial part of its support from governmental units or direct or indirect contributions from the general public; or (3) providing support to another section 501(c)(3) entity that is not a private foundation. In contrast to public charities, private foundations generally are funded from one or a limited number of sources (an individual, family, or corporation) and are subject to a number of restrictions not applicable to public charities. In general, more generous charitable contribution deduction rules apply under section 170 to gifts made to public charities than the rules that apply to gifts made to private foundations.

and gift tax purposes.[12] In addition, section 501(c)(3) organizations also are eligible for certain tax-exempt financing benefits.

Among the other types of organizations described in section 501(c) are (1) social welfare organizations (sec. 501(c)(4)), (2) labor organizations (sec. 501(c)(5)), and (3) trade associations or civic leagues (sec. 501(c)(6)). These entities and other tax-exempt organizations that are not described in section 501(c)(3) (i.e., non-charities) generally are not eligible to receive contributions that are deductible as charitable contributions to the donor for Federal income, estate, or gift tax purposes, but may receive contributions that are deductible under section 162 as a business expense.[13]

The present-law Federal tax rules governing the lobbying and political activities of tax-exempt organizations are described below. In general, although many advocacy activities are often viewed broadly as "political" in the sense that advocacy may be politically motivated or have political implications,[14] the rules described below distinguish lobbying with respect to legislation from political campaign intervention. Moreover, as discussed below, there is no single definition of lobbying under the Internal Revenue Code, nor is there a uniform definition of political campaign intervention.

Political campaign activities

Section 501(c)(3) organizations

Prohibition of political campaign intervention.--Section 501(c)(3) expressly provides that tax-exempt organizations described in that section may not participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office.[15] This

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[12] *See* secs. 145, 170, 2055(a)(2), 2106(a)(2)(A)(ii), and 2522(a)(2). Organizations described in section 501(c)(3) generally are eligible for reduced postal rates and--depending on the applicable State and local laws--may also be eligible for State and local income, property, and sales tax benefits. *See generally* Bruce R. Hopkins, *The Law of Tax-Exempt Organizations*, 41-48 (7th ed. 1998).

[13] Secs. 170(c)(3), 170(c)(4), 2055(a)(3), 2055(a)(4), 2106(a)(2)(A)(iii), 2522(a)(3), and 2522(a)(4).

[14] *See, Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930) (referring to lobbying by charitable organization as "political agitation").

[15] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(iii) defines an organization that intervenes in any political campaign for or against a candidate for public office as an "action organization" not entitled to section 501(c)(3) status. Treasury regulations use the term "action organization" to describe organizations that intervene in political campaigns *and* organizations that engage in substantial lobbying activities.

statutory prohibition is absolute and applies to both types of section 501(c)(3) organizations--that is, public charities and private foundations. In theory, no amount of political campaign activity is consistent with an organization retaining tax-exempt status under section 501(c)(3).[16]

Candidates for public office.--Treasury regulations define the phrase "candidate for public office" as meaning "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local."[17] Thus, the section 501(c)(3) prohibition of political campaign intervention applies to elections at the Federal, State, and local level. Attempts to influence appointments of persons to nonelective public offices do not constitute prohibited political campaign intervention for purposes of section 501(c)(3).[18]

There is no bright-line test for determining the precise moment when an individual becomes a candidate for purposes of the section 501(c)(3) political campaign prohibition.[19] Once an individual formally declares his candidacy for a particular office, his status as a candidate is clear. An individual who has not yet formally announced an intention to seek public office may, under some circumstances, be considered a candidate, although the fact that an individual is a

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[16] *See, Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876, 881 (2d Cir. 1988). In practice, however, the IRS may exercise its discretion by not seeking the sanction of revocation of the organization's tax-exempt status in cases in which the violation was unintentional, involved only a small amount, and the organization subsequently corrected the violation and adopted procedures to prevent future improper political campaign activities. *See* Judith E. Kindell & John F. Reilly, *Election Year Issues, in Continuing Professional Education Exempt Organizations Technical Instruction Program for 1993* 416-19 (1992) (hereinafter *1993 IRS CPE Text*). CPE Texts are prepared regularly by the Exempt Organizations Division of the IRS. They are a nonprecedential source of guidance, but are illustrative of the Service's reasoning on various issues. *See also* PLR 9609007 (Dec. 6, 1995) (the IRS imposed the sec. 4955 penalty for improper political campaign intervention but did not revoke the organization's tax-exempt status).

[17] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(iii).

[18] *See* Notice 88-76, 1988-2 C.B. 392; GCM 39694 (Feb. 3, 1988) (concluding that sec. 501(c)(3) organizations may attempt to influence the Senate's confirmation vote on a nominee for a Federal judgeship, because a Federal judge is not ordinarily considered the holder of an elective public office). With respect to the factors the IRS considers to determine whether an office or position is a "public office" for purposes of section 501(c)(3), *see 1993 IRS CPE Text, supra*, at 404-07; and GCM 39811 (Feb. 9, 1990) (concluding that precinct committeemen were candidates for public office).

[19] *See, Association of the Bar of the City of New York*, 858 F.2d at 880 (individual need not be a party nominee, nor run an organized campaign, to be a candidate for sec. 501(c)(3) purposes).

prominent political figure does not automatically make him a candidate.[20] The IRS takes the view that even if an individual is otherwise not a contestant for an elective public office, by supporting the individual for an elective public office, the 501(c)(3) organization itself can cause him or her to become a candidate "proposed by others" for purposes of the political campaign prohibition.[21]

Participation or intervention in a political campaign.--Section 501(c)(3) expressly provides that prohibited participation or intervention in a political campaign includes the publishing or distributing of statements on behalf of, or in opposition to, a candidate for public office. In addition, Treasury regulations provide that prohibited political campaign activity includes, but is not limited to, the making of oral statements on behalf of or in opposition to a candidate.[22] Organizations described in section 501(c)(3) are prohibited from "directly or indirectly" participating in political campaigns.[23]

Clear examples of prohibited political campaign intervention would include making or soliciting campaign contributions, providing publicity or volunteer assistance, and paying

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[20] *See* PLR 9130008 (April 16, 1991) (ruling that, although an individual was not an officially announced candidate, he was a candidate for sec. 501(c)(3) purposes when his campaign committee published his record and referred to his "prospective candidacy"). *See also 1993 IRS CPE Text, supra*, at 407-08 ("The determination of when an individual has taken sufficient steps prior to announcing an intention to seek election, so that he or she may be considered to have offered himself or herself as a contestant for the office, is based on the facts and circumstances. . . . [S]ome action must be taken to make one a candidate, but the action need not be taken by the candidate or require his consent"); *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621, 630 (2d Cir. 1989) (holding that an independent, third-party candidate "was neither a candidate nor a participant in either of the [Democratic or Republican] primary contests" and, thus, could be excluded from the televised primary debates without violating sec. 501(c)(3)).

[21] *See 1993 IRS CPE Text, supra*, at 408.

[22] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(iii).

[23] *Id. See Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999) (holding that an organization engaged in prohibited political campaign intervention when it placed a newspaper advertisement that was critical of the moral character of a candidate four days before an election, and the advertisement indicated that it was sponsored by the organization and solicited contributions); TAM 199907021 (May 20, 1998) (concluding that particular communications that were critical of Congress but did not refer to specific candidates by name were not prohibited political campaign activities, while broadcasts that identified a person as a candidate and criticized that candidate by name within months of a primary election constituted improper political campaign intervention, despite educational content).

expenses of a political campaign.[24] In situations where there is no explicit endorsement of, or direct provision of financial or other support to, a candidate for elective public office, prohibited political campaign intervention may be implicit, as determined by a consideration of all relevant facts and circumstances.[25]

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[24] *See* IRS announcement IR-92-57 (1992). The IRS recently ruled in TAM 9812001 (August 21, 1996) that the section 501(c)(3) political campaign prohibition was violated when an organization made a loan to a related, non-exempt entity that conducted charitable and political campaign activity. The section 501(c)(3) organization did not take any steps to ensure that the related entity did not use the funds for political purposes, so that, under section 527(f), the loan was a contribution to a political organization, regardless of the rate of interest charged on the loan. In addition, the IRS takes the position that prohibited political campaign intervention may, depending on the facts and circumstances, arise when an organization engages in a business transaction with a candidate, such as the rental of mailing lists or the acceptance of paid political advertising. In such cases, not only must the fee charged for the good or service provided by the charity be set at a fair market rate, but the IRS will consider whether the charity has a "track record" of making available the same goods or services on the same terms to other candidates and noncandidates. *See 1993 IRS CPE Text, supra*, at 432-434.

[25] *See* Rev. Rul. 78-248, 1978-1 C.B. 154; *1993 IRS CPE Text, supra*, at 410-413. The IRS does not use Federal election law "express advocacy" standard; instead, the fundamental test is whether support for or opposition to a candidate is indicated by a particular label used as a stand-in for a candidate. With respect to the issue of whether all facts and circumstances demonstrate implied endorsement of (or opposition to) candidates, the IRS has ruled that "jargon and catch phrases" contained in organization's fundraising letters demonstrated evidence of bias and constituted improper political campaign intervention, even if, as the organization contended, contributions received in response to the letters were used only to finance nonpartisan, educational activities (PLR 9609007 (Dec. 6, 1995)). Similarly, in TAM 9117001 (Sept. 5, 1990), the IRS ruled that, although a candidate's name did not appear in materials distributed by an organization, its messages "represent a clarion call" for conservatives to act in next election, and the "cumulative effect" of this activity together with other political involvement evidenced an overall agenda to intervene in political campaigns. In contrast, in TAM 8936002 (May 24, 1989), the IRS found that a program to "use the spotlight" of the 1984 election to educate citizens about peace and arms control issues, including distribution of TV and radio ads that stressed liberal views and were run coincident to the presidential campaign debates, represented a "clarion call to act in November. . . and specifically, [to] vote for a change," indicated a preference for one candidate. Nevertheless, because the ads arguably could be viewed as "nonpartisan," the IRS "reluctantly" concluded that the education program did not constitute political campaign intervention.

For a discussion of the relevance of intent in determining whether an organization has engaged in political campaign intervention for purposes of section 501(c)(3), *see* Frances R. Hill, *The Role of Intent in Distinguishing Between Education and Politics*, 9 J. Tax'n Exempt Orgs. 9 (1997); Jeffrey L. Yablon & Edward D. Coleman, *Intent is Not Relevant in Distinguishing Between Education and Politics*, 9 J. Tax'n Exempt Orgs. 156 (1998); Gregory L. Colvin, *Can a Section 501(c)(3) Organization Have a Political Purpose?*, 10 J. Tax'n Exempt Orgs. 40 (1998).

The political campaign prohibition of section 501(c)(3) applies to activities conducted by or on behalf of charitable organizations. When an individual affiliated with a charity engages in political campaign activities (e.g., the individual makes a speech endorsing a particular candidate), the question arises whether the political campaign intervention should be attributed to the charity.[26] In this regard, an examination of all the facts and circumstances is necessary to determine whether the individual is acting solely in his or her private capacity (even though the individual's official title with the charity may be used for identification purposes) or whether the individual's political campaign activity should be imputed to the charity (generally by using principles of agency).[27] Similar questions of attribution arise in cases where a section 501(c)(3) charity is affiliated with a section 501(c)(4) lobbying organization. In such cases, the independence of the organizations generally will be respected where, despite overlapping governing boards, the entities are separately incorporated, the records and finances show legally distinct entities, and there are reimbursements meeting fair-market-value standards for any shared facilities or services.[28] Moreover, directors of a charity may, in their individual/private capacities, establish a PAC (referred to as a "non-connected PAC"), so long as they do not use the charity's resources; but the charity itself may not establish a PAC to conduct or fund political

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[26] *See 1993 IRS CPE Text, supra*, at 435-36 (explaining that the use of organization's resources or facilities is indicative that actions of individual are attributable to the organization; in some cases, organization may implicitly ratify actions taken by an affiliated individual); Bruce R. Hopkins, *Charity, Advocacy, and the Law* 400-01 (1992).

[27] *See, e.g.*, Rev. Rul. 72-513, 1972-2 C.B. 246 (ruling that a student newspaper's political views were not attributable to the university); Rev. Rul. 72-512, 1972-2 C.B. 246 (ruling that a requirement that students enrolled in a political science course participate in a political campaign of their choice does not constitute prohibited political campaign activity by the university). *See also* GCM 34631 (Oct. 4, 1971); Internal Revenue Service, *Publication 1828: Tax Guide for Churches and Other Religious Organizations* at 10 (Announcement 94-112, 1994-42 I.R.B. 20) (employees of organization may express personal political views but generally not in organization publications or at official organization functions); TAM 9635003 (April 19, 1996) (concluding that an organization engaged in prohibited political campaign activity by providing a platform for forum participants to endorse candidates of their choice and by publishing the participants' opinions, even though the organization claimed that it did not endorse any candidate).

[28] *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983); *FCC v. League of Women Voters of California*, 468 U.S. 364, 399-401 (1984); *1993 IRS CPE Text, supra*, at 437-40. In 1987, Congress enacted section 6033(b)(9), which requires charities to disclose on their annual information returns (Form 990) information about direct and indirect transactions or relationships between a charity and other tax-exempt organizations (e.g., certain lobbing organizations) or political organizations described in section 527. The objective of this provision is to prevent the diversion of funds from a charitable organization's exempt purposes or misallocation of revenues or expenses between organizations. *See* H.R. Rep. No. 100-391, pt. 2, at 1616 (1987).

campaign activities.[29]

Not all election-related activities are prohibited activities for organizations described in section 501(c)(3). For instance, voter education activities generally do not constitute "participation or intervention" in a political campaign on behalf of or in opposition to a candidate and are, therefore, permissible activities under section 501(c)(3), provided that the activities are nonpartisan in nature.[30] Publishing a compilation of voting records or responses to candidate questionnaires generally does not constitute prohibited political campaign activity when a wide range of issues are addressed and the published results do not suggest a bias for or against any candidate.[31] However, an alleged neutral effort to educate voters may evidence a bias and, thus, constitute prohibited political campaign intervention. Under some circumstances, dissemination of otherwise educational materials may be viewed as improper political campaign intervention, such as when an organization widely distributes (during an election campaign) a compilation of voting records of candidates only on a narrow range of issues.[32] Under other circumstances, a charity may (consistent with sec. 501(c)(3) status) publish a newsletter containing voting records of incumbents on selected issues of interest to the organization, provided that the newsletter is

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[29] *See* Treas. Reg. sec. 1.527-6(g). *See also Commentary on IRS 1993 Exempt Organizations Continuing Professional Educational Education Technical Instruction Program Article on "Election Year Issues,"* prepared by individual members of the Subcommittee on Political and Lobbying Activities and Organizations of the Committee on Exempt Organizations of the Section of Taxation, American Bar Association (Feb. 21, 1995) in 11 Exempt Org. Tax Review 854, 864-65 (1995) (hereinafter *1995 ABA Comments*) (requesting clarification from IRS as to when individuals affiliated with a charity are acting solely in their individual/private capacities in establishing a PAC).

[30] *See Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989) (holding that an organization with stated goals to foster voter education and participation in the electoral process, and which sponsored nationally televised primary debates among candidates of the two major political parties, is entitled to sec. 501(c)(3) status). *See also* Rev. Rul. 86-95, 1986-2 C.B. 73 (conducting a public forum for debate between candidates does not constitute political campaign intervention if the format and issues are selected on a nonpartisan basis); Rev. Rul. 74-574, 1974-2 C.B. 160 (noncommercial broadcast station did not violate sec. 501(c)(3) by providing free air time to all legally qualified candidates on an equal basis); TAM 9635003 (April 19, 1996) (where inviting all legally qualified candidates to a candidate debate is impractical, charity may adopt reasonable, objective criteria for determining which candidates to invite to a debate conducted in a neutral, nonpartisan manner).

[31] *See* Rev. Rul. 78-248, 1978-1 C.B. 154 (charity may disseminate voting records or candidate questionnaires under certain fact patterns).

[32] *See* Rev. Rul. 78-248; Rev. Rul. 76-456, 1976-2 C.B. 151 (organization that asked candidates to sign a code of fair campaign practices, and released named of candidates who signed or refused to sign, was intervening in political campaigns).

distributed to the organization's normal readership (rather than being distributed to the general public or to any particular congressional district), is not timed to coincide with any particular election, and no comment is made on an individual's qualifications for public office.[33]

Depending on the facts and circumstances involved, candidates may be invited to speak at an event of an organization described in section 501(c)(3) without violating the rule against political campaign intervention. If a candidate is invited to speak in his or her capacity as a candidate, then other candidates also must be invited to speak and there should be no indication of support for, or opposition to, any candidate by the organization. If a candidate is invited to speak in his or her individual capacity other than as a candidate (e.g., the candidate formerly held public office or is an expert in a public policy field), then equal access to all other candidates need not be provided. However, in such cases, the IRS position is that the organization must ensure that the candidate speaks only in his or her individual capacity other than as a candidate, that no mention is made of the individual's candidacy at the event, and that no campaign activity occurs in connection with the event.[34]

Voter registration and "get-out-the-vote" drives are permissible activities for public charities, provided that the voter registration or "get-out-the-vote" drives are nonpartisan and not specifically identified by the organization with any candidate or political party.[35] However, voter

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[33] *See* Rev. Rul. 80-282, 1980-2 C.B. 178. The IRS takes the view (and some practitioners agree) that activities may be both educational and political campaign intervention. *See 1993 IRS CPE Text, supra*, at 414-15; *1995 ABA Comments* at 14. *See also* TAM 8936002 (May 24, 1989) ("Educating the public is not inherently inconsistent with the activity of impermissibly intervening in a political campaign."). More recently, organizations themselves have argued, in seeking recognition from the IRS of their tax-exempt status under section 527, that materials they distributed were educational, yet also constituted political campaign intervention because such materials were intended to influence readers to consider the organization's views when voting. *See* PLR 9808037 (Nov. 21, 1997).

In addition, even if an activity initially meets the test of being "educational" and does not constitute prohibited political campaign intervention, the activity may be conducted in a manner that results in substantial private benefits inconsistent with the organization's tax-exempt status under section 501(c)(3). *See* Treas. Reg. sec. 1.501(c)(3)-1(d)(1)(ii); *Better Business Bureau v. United States*, 326 U.S. 279 (1945) (observing that regardless of the number or importance of truly educational purposes, the organization was not operated exclusively for educational purposes due to its objective of pursuing an ethical and profitable business community); *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989) (holding that a training school for campaign staff workers was not entitled to sec. 501(c)(3) status due to the private benefit conferred upon the Republican party).

[34] *See 1993 IRS CPE Text, supra* at 430-432.

[35] *See* Treas. Reg. sec. 1.527-6(b)(5); TAM 9117001 (Sept. 5, 1990) ("[I]t is not a section 501(c)(3) purpose to only register and educate voters to vote for favored candidate or party").

registration drives conducted by private foundations may be subject to penalty excise taxes unless specific statutory criteria are satisfied under section 4945(f) (discussed further below).

If a charity endorses, rates, or evaluates the qualifications of candidates for elective public office, then the political campaign intervention rule of section 501(c)(3) has been violated, even if the endorsements or ratings are allegedly based on neutral assessments of the candidates' professional, intellectual, or ethical qualifications, rather than partisan grounds.[36] Moreover, the IRS has concluded that, even if a charity itself and its employees do not formally endorse any candidate, prohibited political campaign activity occurs if the charity provides a platform for others to endorse candidates by conducting candidate forums and publishing ratings of (or opinions about) candidates proffered by potential voters who attend the forums.[37]

Attempts to influence the outcome of voting by the public on referendums, initiatives, or constitutional amendments are not prohibited political campaign activities for public charities, but are considered "lobbying" activities and, thus, are subject to the limitation that such activities not be "substantial"[38] (see discussion below of lobbying rules). Similarly, efforts to influence the issues addressed in the platform of a political party have been viewed as a lobbying effort and not prohibited political campaign intervention.[39] However, such expenditures made by private foundations to influence referendums or party platforms (even if not substantial) potentially may be subject to penalty excise taxes under section 4945 (as discussed below).

Under some circumstances, voter participation efforts undertaken by charities may be targeted to certain politically disadvantaged (or other) groups, even if it is likely that members of the targeted group will vote disproportionately for candidates of a certain party. *See* PLR 9223050 (March 10, 1992) (targeting of voter participation efforts to homeless persons); PLR 8822056 (March 4, 1998) (targeting of efforts to minority, low-income, and immigrant groups).

[36] *See Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988) (rating of judicial candidates against general standards of competence was prohibited activity); Rev. Rul. 67-71, 1967-1 C.B. 125 (rating of school board candidates was prohibited activity, even if process was objective and intended to inform public about candidates).

[37] *See* TAM 9635003 (April 19, 1996) (ruling that forums were composed of participants selected through a scientific method to reflect the democratic characteristics of a community, but publication of the participants' ratings of the candidates was improper political campaign intervention). The IRS further concluded in TAM 9635003 that section 501(c)(3) was not violated the year that the organization conducting the forums published a final report that merely listed questions posed to the candidates and their responses but did not include the opinions of forum participants with respect to rating (or qualifications of) the candidates.

[38] Treas. Reg. sec. 1.501(c)(3)-1(c)(3).

[39] *See* Hopkins, *Charity, Advocacy, and the Law, supra*, at 399.

Penalty excise taxes

Private foundations are subject to revocation of their tax-exempt status under section 501(c)(3) if they engage in prohibited political campaign activity. Moreover, private foundations (and their managers) are subject to penalty excise taxes under section 4945 if the foundation makes a "taxable expenditure."[40] For this purpose, "taxable expenditures" include any amount paid to influence the outcome of a specific public election or to carry on (directly or indirectly) voter registration drives, unless the activities are nonpartisan, are not confined to one specific election period, are carried on in five or more States, and certain other conditions are satisfied.[41]

Prior to the Omnibus Budget Reconciliation Act of 1987 ("1987 Act"), the only enforcement tool available to the IRS in cases where a public charity engaged in prohibited political campaign intervention was revocation of the organization's tax-exempt status under section 501(c)(3). This sanction, however, was often viewed as an ineffective remedy, because revocation could be too severe in some cases, or irrelevant in other cases because the organization had ceased operations after its resources were improperly depleted. Consequently, the 1987 Act extended to public charities the two-tiered penalty excise structure applicable to private foundations. Under section 4955, if any charitable organization described in section

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[40] Section 4945 imposes an excise tax penalty on private foundations equal to 10 percent of the amount of their taxable expenditures. Any foundation manager who, without reasonable cause, agrees to make an expenditure knowing that it is a taxable expenditure is subject to a penalty equal to 2.5 percent of the amount of the expenditure (not exceeding $5,000 per expenditure). Furthermore, if the taxable expenditure is not "corrected" (i.e., recovered to the extent possible within a specified time period and additional safeguards established to prevent future taxable expenditures), then an additional (so-called "second-tier") tax is imposed on the foundation equal to 100 percent of the amount of the expenditure, and an additional tax is imposed on any foundation manager who refuses to agree to correction equal to 50 percent of the amount of the expenditure (not exceeding $10,000 per expenditure). The IRS is not to assess, or is to abate or refund, any initial (so-called "first-tier") excise tax on political expenditures if the foundation or manager establishes to the satisfaction of the IRS that (1) the political expenditure was not willful and flagrant, and (2) the political expenditure was corrected within a specified time period. Sec. 4962.

[41] Secs. 4945(d)(2) and 4945(f). In addition, under section 507(a)(2), willful repeated violations (or a willful and flagrant violation) of the private foundation rules giving rise to penalty excise taxes can lead to termination of private foundation status, and the organization can be required to pay the Federal Government a termination tax equal to the lesser of (1) the value (with interest) of all tax benefits received (by the organization or certain substantial contributors thereto) by reason of the organization's former status under section 501(c)(3), or (2) the net value of the foundation's assets. This penalty may be abated to the extent that the organization contributes its assets to one or more existing section 501(c)(3) public charities, or if certain corrective action is initiated under State law to insure that the assets of the foundation are preserved for charitable purposes. Sec. 507(g).

501(c)(3), including a public charity, makes a political expenditure, the organization is subject to an excise tax equal to 10 percent of the amount of the expenditure.[42] Additional penalty taxes may be imposed if the violation is not corrected within a specified time period.[43]

The penalty excise tax under section 4955 may be imposed in addition to the sanction of revocation of the organization's tax-exempt status (and eligibility to receive tax-deductible contributions) by reason of its political campaign activities.[44] Consistent with section 501(c)(3), section 4955 does not permit a de minimis amount of political campaign intervention. However, the Treasury Department indicated when it issued final regulations regarding section 4955 that "there may be individual cases where, based on the facts and circumstances such as the nature of the political intervention and the measures that have been taken by the organization to prevent a recurrence, the IRS may exercise its discretion to impose a tax under section 4955 but not to seek revocation of the organization's tax-exempt status."[45]

For purposes of section 4955, the term "political expenditure" is defined (by tracking the sec. 501(c)(3) language) as any expense incurred by a charity in participating or intervening in a political campaign for or against a candidate for public office. In addition, in the case of an organization claiming section 501(c)(3) status but which, in fact, was formed (or which is

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[42] As under the section 4945 penalty regime, a 2.5 percent penalty excise tax may be imposed under section 4955(a)(2) on organization managers who knowingly agree to make improper political expenditures (not exceeding $5,000 per expenditure). The IRS is not to assess, or is to abate or refund, any initial (so-called "first tier") excise tax on political expenditures if the organization or manager establishes to the satisfaction of the IRS that (1) the political expenditure was not willful and flagrant, and (2) the political expenditure was corrected within a specified time period. Sec. 4962.

[43] In cases where the political expenditure is not corrected within a specified time period, section 4955(b) provides that the organization is subject to a so-called "second tier" excise tax penalty equal to 100 percent of the amount of the political expenditure. Managers who refuse to agree to correction are subject to an excise tax penalty equal to 50 percent of the amount of such expenditure (not exceeding $10,000 per expenditure).

[44] *See* H.R. Conf. Rep. No. 100-495, at 1020 (1987). To prevent imposition of multiple excise tax penalties on the same political campaign expenditure, section 4955(e) provides that if a tax is imposed under section 4955, then no penalty tax may be imposed under section 4945, which otherwise applies to taxable expenditures made by private foundations, or section 4958, which provides for intermediate sanctions in cases where public charities engage in certain excess benefit transactions with insiders.

[45] T.D. 8628, 60 Fed. Reg. 233 (1995) (containing final regulations regarding sec. 4955). *See also 1993 IRS CPE Text, supra*, at 416-419; TAM 9635003 (April 19, 1996) (publication of candidate ratings from citizen caucuses resulted in imposition of sec. 4955 taxes but not revocation of tax-exempt status).

effectively controlled and availed of) primarily for purposes of promoting the candidacy or potential candidacy of an individual for public office, section 4955(d)(2) enumerates certain expenditures--such as expenses for travel by such individual, for conducting surveys or preparing materials for use by the individual, or for advertising or fundraising--as being included in the term "political expenditure."[46] Expenditures for voter registration, voter turnout, or voter education constitute "political expenditures" subject to the section 4955 excise tax only if the expenditures violate the prohibition on political campaign activity provided in section 501(c)(3).[47]

The 1987 Act also included other provisions to enhance the IRS' ability to enforce the prohibition against political campaign expenditures, including section 6852 (which authorizes the IRS to make an immediate determination and assessment of taxes in cases where there have been flagrant political campaign expenditures by a charity), section 7409 (which provides that the IRS may seek an injunction from a Federal district court in such cases to prevent future improper expenditures), and section 504(a)(2)(B) (which provides that an organization--other than a church--that ceases to qualify for tax-exempt status under sec. 501(c)(3) by reason of its political campaign activities cannot at any time thereafter qualify as a tax-exempt social welfare organization under sec. 501(c)(4)).[48]

Other 501(c) organizations

In general.--Tax-exempt organizations other than those described in section 501(c)(3) generally are permitted to engage in political campaign activities.[49] However, political campaign activities cannot be the primary activities of an organization described in section 501(c), such as a social welfare organization described in section 501(c)(4).[50] Instead, organizations that

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[46] *See* Treas. Reg. sec. 53.4955-1(c)(2)(ii) (stating that the determination of whether the primary purpose of an organization is promoting the candidacy of an individual is made on the basis of all facts and circumstances).

[47] *See* Treas. Reg. sec. 53.4955-1(c)(2)(iii).

[48] However, a charity that engages in political campaign activities and, consequently, loses its tax-exempt status for a taxable year generally may apply for restoration of its section 501(c)(3) status for a subsequent taxable year, during which it will continue to be subject to the political campaign prohibition and other rules of section 501(c)(3).

[49] However, some tax-exempt organizations (such as section 501(c)(2) title-holding companies) appear to be precluded from political campaign activities because the subparagraph in which they are described limits them to an exclusive purpose that does not include advocacy activities. *See 1993 IRS CPE Text* at 478.

[50] *See* Treas. Reg. sec. 1.501(c)(4)-1(a)(2)(ii) ("[P]romotion of social welfare does not include direct or indirect participation in political campaigns on behalf of or in opposition to any

primarily conduct or fund political campaign activities are eligible for a limited tax-exempt status under section 527 (discussed below).

Even though a 501(c) organization (other than a charity described in section 501(c)(3)) that engages in political campaign activities will generally retain its tax-exempt status so long as such activities are not the primary means of accomplishing its purposes, such activities nonetheless will result in the organization being subject to tax under section 527(f) on the lesser amount of its investment income or the amount expended on political activities.[51] However, a non-charity may establish a separate segregated fund, which may be treated as a separate organization under section 527(f)(3), such that the expenditures and investment income of the fund will not be attributed to the sponsoring organization.[52]

Associations that receive tax-deductible dues.--As a result of the Omnibus Budget Reconciliation Act of 1993 ("1993 Act"), tax-exempt trade associations and certain other tax-exempt organizations (but not charities described in section 501(c)(3)) generally are required to provide annual information disclosure to members (sometimes referred to as "flow-through information disclosure") estimating the portion of their dues allocable to political campaign activities, as well as any lobbying activities as defined under section 162(e)(1).[53] However, such disclosure is not required for an organization that (1) incurs only a de minimis amount (i.e., $2,000 or less) of in-house political campaign and lobbying expenditures during the taxable year; (2) elects to pay a 35-percent proxy tax on its political campaign and lobbying expenditures incurred during the taxable year rather than provide flow-through information disclosure to its members; or (3) establishes pursuant to Treasury Department rules that substantially all of its dues monies are paid by members not entitled to deduct such dues in computing their taxable

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candidate for public office"); Rev. Rul. 81-95 1981-1 C.B. 332. *See also 1993 IRS CPE Text, supra*, at 479.

[51] *See* discussion of sec. 527 below. The purpose of section 527(f) is to prevent organizations from using their otherwise tax-free investment income to fund political campaign activities.

[52] Treas. Reg. sec. 1.527-6(b)(1)(I) allows a noncharity to incur certain overhead and administrative expenses (i.e., "indirect expenses") with respect to a PAC without the noncharity being subject to tax under section 527(f) with respect to such expenses.

[53] The purpose of this rule is to prevent taxpayers from avoiding section 162(e) (which disallows trade or business expense deductions for political campaign and lobbying expenditures) by paying otherwise deductible dues to a trade association or other tax-exempt entity which, in turn, makes political campaign or lobbying expenditures on behalf of its dues-paying members. Accordingly, section 162(e)(3) specifically provides that no trade or business expense deduction is allowed for the portion of dues paid to a tax-exempt organization which the organization notifies the taxpayer under section 6033(e) is allocable to political campaign or lobbying expenditures made by the organization.

income (sec. 6033(e)).[54]

Lobbying

Section 501(c)(3) organizations

In general.--The Internal Revenue Code rules governing lobbying by charitable organizations described in section 501(c)(3) can be viewed as creating three separate regimes. There is a separate set of rules for private foundations under section 4945. In addition, with respect to public charities, the Code differentiates between public charities that affirmatively elect to be subject to special rules under sections 501(h) and 4911 (commonly referred to as "electing public charities") and all other public charities that do not make this election (commonly referred to as "non-electing public charities").[55] In general, the operation of the lobbying restrictions does not depend on whether the lobbying activities of a charity are intended to further its charitable purposes (with an exception for so-called "self-defense direct lobbying," described below).[56] However, whether or not public policy discussions (even if technically not lobbying) are intended to benefit a large segment of the population or a charitable class, as opposed to the private interests of a limited group of individuals, may be relevant to the determination whether the activity satisfies the section 501(c)(3) requirement that the

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[54] Such Treasury Department rules are contained in Rev. Proc. 98-19, 1998-7 I.R.B. 30, which exempts from the section 6033(e) flow-through information disclosure requirements all tax-exempt organizations other than: (1) social welfare organizations described in section 501(c)(4) that are not veterans organizations; (2) agricultural and horticultural organizations (but not labor unions) described in section 501(c)(5); and (3) business leagues and trade associations described in section 501(c)(6). In addition, an organization falling within one of these three categories of tax-exempt entities that generally are subject to the section 6033(e) requirements is nonetheless entitled to an exemption under Rev. Proc. 98-19 if: (1) more than 90 percent of all annual dues (or similar amounts) are received from persons who each pay annual dues of $75 or less (provided that the organization is not described in section 501(c)(6)); (2) more than 90 percent of all annual dues are received from charities, governmental entities, or tax-exempt organizations which themselves are exempt from the section 6033(e) rules; or (3) the organization maintains records (and notifies the IRS) that 90 percent or more of the annual dues paid to the organization are not deductible to its members, without regard to any political campaign or lobbying expenditures made by the organization.

[55] *See generally* Hopkins, *Charity, Advocacy, and the Law, supra*, 130-235.

[56] *See Haswell v. United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974) ("The applicability of the influencing legislation clause is not affected by the selfish and unselfish motives and interests of the organization, and it applies to all organizations whether they represent private interests or the interests of the public."); Judith E. Kindell & John F. Reilly, *Lobbying Issues, in Continuing Professional Education Exempt Organizations Technical Instruction Program for FY 1997 272 (hereinafter 1997 IRS CPE Text*) (finding no distinction between "good" and "bad" legislation).

organization be "operated exclusively" for charitable or other exempt purposes or, instead, whether the organization serves substantial non-exempt purposes inconsistent with section 501(c)(3) status. (This issue is commonly referred to as the "private benefit" test.)[57]

Limitation on lobbying activities

Section 501(c)(3) expressly provides that an organization is not entitled to tax-exempt status under that section unless "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation" (commonly referred to as "lobbying").[58] Thus, public charities may engage in some lobbying activities, provided that such activities are not substantial, without losing their tax-exempt status and generally without being subject to tax.[59] In contrast, private foundations are subject to the restriction that lobbying activities--even if insubstantial so as not to jeopardize the foundation's tax-exempt status--may result in the foundation being subject to penalty excise taxes, unless one of the statutory exceptions contained in section 4945(e) (such as for nonpartisan analysis or self-defense lobbying) apply.

Definition of "lobbying" and "action" organizations

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[57] *See American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989) (because the operational test under sec. 501(c)(3) "examines the actual purpose for the organization's activities and not the nature of the activities or the organization's statement of purpose," the court looked beyond the four corners of the organization's charter to discover "the actual objects motivating the organization" and found that political campaign school had a partisan purpose and the secondary benefit to the Republican entities and candidates was more than incidental); *Fund for the Study of Econ. Growth and Tax Reform v. IRS*, 997 F. Supp. 15 (D.D.C. 1998) (taking into account "overt partisan statements" of creators of the organization and finding that the organization did not qualify for sec. 501(c)(3) status because it supported a "one-sided political agenda" and, thus, engaged in substantial non-exempt activities), *aff'd on other grounds*, 161 F.3d 755 (D.C. Cir. 1998). *See also Better Business Bureau v. United States*, 326 U.S. 279 (1945) (holding that regardless of the number of activities that educated business persons and the general public, organization was not entitled to tax-exempt status as "educational" entity because its "activities are largely animated by a commercial purpose" and "are directed fundamentally to ends other than that of education"); *Callaway Family Association, Inc. v. Commissioner*, 71 T.C. 340 (1978) (organization found to have engaged in substantial nonexempt activities serving private interests by conducting genealogical research focusing on the Callaway family and by urging family members to join by asserting that the organization was "for you, about you").

[58] *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (holding that restrictions on lobbying activities of charitable organizations are constitutionally valid).

[59] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(ii) provides: "An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation."

There is no statutory definition under section 501(c)(3) of "propaganda, or otherwise attempting, to influence legislation."[60] However, Treasury regulations provide that an organization is an "action" organization not entitled to tax-exempt status under section 501(c)(3) due to its lobbying activities if a substantial part of the organization's activities is (1) contacting, or urging the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (2) advocating the adoption or rejection of legislation.[61] Thus, attempts to influence legislation under section 501(c)(3) include directly contacting members of a legislative body (and their staffs) to propose, support, or oppose legislation (so-called "direct lobbying"), and also include urging the public to contact legislative bodies, or otherwise attempting to influence public opinion, with respect to legislation (so-called "grass roots lobbying"). Except as specifically provided for in Treasury regulations (described below), the IRS takes the position that whether a particular communication constitutes an attempt to influence legislation generally is determined on the basis of the facts and circumstances surrounding the communication in question.[62]

For purposes of section 501(c)(3), the term "legislation" includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.[63] "Action" by the Congress or by a State legislature or local council refers to introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items.[64] Contacting executive branch officials generally is not considered lobbying for purposes of section 501(c)(3), unless the charity requests that the executive branch official support or oppose legislation to be considered by a legislative body.[65] Legislation need not actually be formally introduced if a specific legislative

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[60] As discussed *infra*, there is a statutory definition of "influencing legislation" under section 4911(d) for public charities that make an election under section 501(h) to have their lobbying efforts judged against a sliding-scale, numeric standard.

[61] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(ii).

[62] *See 1997 IRS CPE Text, supra,* at 273.

[63] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(ii). The IRS has stated that the section 501(c)(3) prohibition on substantial lobbying activities applies to attempts to influence legislation of a foreign country. See Rev. Rul. 73-440, 1973-2 C.B. 177; *1997 IRS CPE Text, supra,* at 272.

[64] See Notice 88-76, 1988-2 C.B. 392. Actions taken by a legislative body with respect to confirmation of a nominee for a public office (e.g., Federal judges) are included within the term "legislation" for section 501(c)(3) purposes, and also may be "exempt function" activities for purposes of the section 527(f) tax. *See* Announcement 88-114, 1988-37 I.R.B. 26 (Sept. 12, 1988), *1993 IRS CPE Text, supra,* at 448 n.8 (stating that IRS has made no final determination on the sec. 527 issue), and the discussion below of sec. 527(f)).

[65] *See* Rev. Rul. 67-293, 1967-2 C.B. 185; *1997 IRS CPE Text, supra,* at 277.

proposal is being advocated.[66]

Discussions of broad social or public policy issues (without advocating a specific legislative proposal) generally do not constitute attempts to influence legislation for purposes of section 501(c)(3).[67] However, even if a public discussion of broad social or policy issues does not constitute an attempt to influence legislation for purposes of section 501(c)(3), there is still a separate issue of whether the discussion is educational (or furthers some other charitable purpose).[68] Thus, if an organization conducts substantial public discussions or disseminates

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[66] *See Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 1175 (10th Cir. 1972) (urging public to contact legislators to support prayer in school and oppose foreign aid constituted attempts to influence legislation).

[67] *See* Rev. Rul. 66-256, 1966-2 C.B. 210 (discussion of controversial social and political issues does not disqualify an organization from obtaining tax exemption under sec. 501(c)(3)). A parallel rule for private foundations also exempts from the definition of "lobbying" discussions of broad social, economic, and similar problems, even if the problems are of a type with which the government would be expected to deal ultimately. See Treas. Reg. sec. 53.4945-2(d)(4). Moreover, as discussed below, regulations promulgated under section 4911 provide a similar exception for discussions of broad social and policy issues by public charities making the section 501(h) election, with special rules for certain mass media advertising. See Treas. Reg. secs. 56.4911-2(c)(2) and 56.4911-2(b)(5). Likewise, regulations promulgated under section 162 provide that expenditures for institutional or "good will" advertising--including advertising which keeps the taxpayer's name before the public and which presents views on economic, financial, social, or other subjects of a general nature--generally are deductible as trade or business expenses rather than being viewed as attempts to influence legislation, provided that such expenditures are related to patronage the taxpayer might reasonably expect in the future. Treas. Reg. sec. 1.162-20(a)(2).

[68] *See, e.g., Nationalist Movement v. Commissioner*, 102 T.C. 558 (1994) (holding that the publication of materials advocating social and political change was not "educational" activity under sec. 501(c)(3) because presentation of viewpoints was unsupported by facts, made substantial use of inflammatory and disparaging terms, and expressed conclusions based on emotions rather than objective evaluation), aff'd 37 F.3d 216 (5th Cir. 1994); Rev. Proc. 86-43, 1986-2 C.B. 729 (which describes the so-called "methodology test" for judging whether advocacy of a particular viewpoint is considered "educational" under sec. 501(c)(3)). *See also National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983) (upholding the denial of tax-exempt status to an organization that published a newsletter promoting racial hatred and violence against minority groups, because the newsletter "cannot reasonably be considered intellectual exposition" and, thus, there was no possibility that it could be found to be "educational within any reasonable interpretation of the term"); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (holding that the Treasury regulation that defined "educational" activity as requiring a "full and fair exposition" was unconstitutionally vague and susceptible to discriminatory enforcement). *But see National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that the void-for-vagueness

materials concerning broad social or policy issues in a manner that does not further an educational or other exempt purpose, then such activity could jeopardize the organization's tax-exempt status under section 501(c)(3), not because the organization has engaged in substantial lobbying, but rather because it has engaged in substantial activities that do not further an exempt purpose.

Despite this general rule for discussions of broad social issues, Treasury Regulation section 1.501(c)(3)-1(c)(3)(iv) provides for a separate, distinct test under which an organization is treated as an "action organization"--and, thus, not entitled to section 501(c)(3) status--if it has the following two characteristics: (1) its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (2) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered. In essence, the "action" organization test of Treasury Regulation section 1.501(c)(3)-1(c)(3)(iv) allows substantial lobbying to be found due to the nature of the organization and its aims.[69]

Exceptions for non-electing public charities.--Even when a communication refers to a specific legislative proposal (or the organization's primary objective may be attained only by passage or defeat of legislation), the dissemination of nonpartisan analysis or research with respect to a legislative proposal (or the organization's primary objective), without advocating legislative action, is not considered lobbying for purposes of section 501(c)(3).[70] Likewise,

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doctrine is not a limitation when government is selecting which types of speech to subsidize).

[69] *See Fund for the Study of Econ. Growth and Tax Reform v. IRS*, 997 F. Supp. 15 (D.D.C. 1998) (finding that two-part test for "action" organization was satisfied because organization conceded that the only way of achieving its policies was through legislative reform, and because press reports and other evidence indicated that the organization "actively engaged in advocacy and furthering a particular political agenda"), *aff'd on other grounds*, 161 F.3d 755 (D.C. Cir. 1998); Rev. Rul. 62-71, 1962-1 C.B. 85 (research and publications of organization, considered alone, may be educational, but sec. 501(c)(3) status was not available because the organization was primarily involved not only in teaching but in advocating the adoption of a doctrine that could be effective only by enactment of legislation); *Roberts Dairy Co. v. Commissioner*, 195 F.2d 948 (8th Cir. 1952); *1997 IRS CPE Text*, *supra*, at 276.

[70] *See, e.g.*, Rev. Rul. 64-195, 1964-2 C.B. 138 (organization conducted nonpartisan analysis of a proposed constitutional amendment and disseminated materials to the public, but did not advocate approval or disapproval of the amendment); Rev. Rul. 70-79, 1970-1 C.B. 127 (some of the policies formulated by the organization could be carried out only through legislation, but the organization was entitled to sec. 501(c)(3) status due to the educational nature of its activities and because it did not make any specific legislative recommendations. See also

responding to a governmental request for testimony is not treated as a lobbying activity.[71] In addition, advocacy by a charity with respect to legislation that could affect the powers or existence of the organization itself (so-called "self-defense lobbying") generally is considered to be exempt from the section 501(c)(3) lobbying restriction.[72]

Attribution.--Similar to questions that arise with respect to the political campaign prohibition under section 501(c)(3) (discussed previously), when an individual affiliated with a charity makes a lobbying communication, the question arises whether the lobbying should be viewed as an activity of the individual acting in his or her private capacity or whether the activity should be attributed to the charity. In general, resolution of this issue depends on whether the lobbying activities are within the scope of the individual's authority to act as an agent for the organization (or, if not, whether the organization implicitly ratified the individual's acts).[73] The lobbying activities of a section 501(c)(4) organization will not be attributed to an affiliated charity, so long as the entities are separately incorporated, the records show legally distinct

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1997 IRS CPE Text, supra, at 274. As discussed below, a slightly different rule may apply to the nonpartisan analysis exceptions under sections 4911 and 4945, where nonpartisan analysis of a legislative proposal is permitted in order to advocate a particular position or viewpoint, without being treated as lobbying, provided that the communication does not "directly encourage" the recipient to take action within the meaning of Treas. Reg. sec. 56.4911-2(b)(2)(iii)(A)-(C). It remains unclear how the nonpartisan analysis exception for non-electing public charities compares to the nonpartisan analysis exception under sections 4911 and 4945. *See* Hopkins, *Charity, Advocacy, and the Law, supra*, at 168 (explaining that it is inadvisable to borrow to heavily from the sec. 4911 rules for nonpartisan analysis when judging activities of non-electing public charities); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 Tex. L. Rev. 1269, 1344-45 n.263 (1993) (noting that the more generous nonpartisan analysis exception of secs. 4911 and 4945 may eventually be applied to non-electing public charities).

[71] *See, e.g.*, Rev. Rul. 70-449, 1970-2 C.B. 112 (ruling that providing expert testimony to a Congressional committee at the committee's request is not lobbying).

[72] Although there is no precedential ruling from the IRS with respect to self-defense lobbying by a non-electing public charity seeking to protect the organization's own existence or powers under the law, the IRS recognized the self-defense exception in GCM 34289 (May 8, 1970) prior to the enactment of section 501(h). *See 1997 IRS CPE Text, supra*, at 277 n.20; *see also* Galston, *supra*, at 1284 n.40. For the counterpart "self-defense" exceptions for public charities making the 501(h) election, see sec. 4911(d)(2)(C) and Treas. Reg. sec. 56-4911-2(c); for the counterpart "self-defense" exception for private foundations, *see* sec. 4945(e) and Treas. Reg. sec. 53-4945-2(d).

[73] *See* PLR 9507020 (Nov. 17, 1994); *1997 IRS CPE Text, supra*, at 277-78.

entities, and there are fair-market-value reimbursements for any shared facilities or services.[74] However, because the lobbying restriction is not absolute under section 501(c)(3), a charity may provide some support to lobbying efforts undertaken by another entity, provided that the provision of such support (along with any lobbying activities directly conducted by the charity) does not violate the "substantial part" test (or, sec. 501(h) expenditure limits, if elected by the charity).

Determination of substantiality.--In addition to the definitional question of whether a communication constitutes "lobbying" for purposes of section 501(c)(3), there is a second issue of whether the level of an organization's lobbying activities is "substantial." Except for public charities that make the section 501(h) election (as discussed below), there is no bright-line, mechanical rule for determining whether lobbying activities are substantial relative to the organization's other activities. Rather, the particular facts and circumstances surrounding all activities of the organization (including volunteer time) must be examined. In particular, an arithmetical percentage test (e.g., looking at the percentage of the budget, or employee's time, spent on lobbying) while relevant, has been held not determinative.[75] When Congress enacted section 501(h), it was specifically provided in section 501(h)(7) that the determination of whether the lobbying of a non-electing charity is "substantial" is not affected by the numeric tests provided for by sections 501(h) and 4911 (described below).

Lobbying rules for electing public charities

Section 501(h) election.--Certain public charities may elect under section 501(h) to have the amount of permitted lobbying expenditures measured under the statutory, arithmetical tests set forth in sections 501(h) and section 4911.[76] The arithmetical tests provide an alternative to the imprecise, facts-and-circumstances test of substantiality that otherwise applies to section

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[74] *See 1997 IRS CPE Text, supra*, at 337.

[75] *See, e.g., Haswell v. United States*, 500 F.2d 1133 (Ct Cl. 1974); (holding that an organization's lobbying activities were substantial when roughly 16-20 percent of its expenditures were for lobbying and the organization's lobbying activities were in other respects an important part of its mission); *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972); (rejecting a percentage test in favor of weighing an organization's lobbying activities in light of the organization's overall purposes and activities); a *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955) (deciding that lobbying that accounted for less than 5 percent of an organization's activities is not substantial). *See also 1997 IRS CPE Text, supra*, at 279-80; Galston, *supra*, at 1279-80.

[76] Public charities eligible to make the section 501(h) election include educational institutions, hospitals, and organizations receiving a certain proportion of support from the general public, but not churches and certain church-related entities. Secs. 501(h)(4)-(5). Churches were made ineligible for the section 501(h) election at their own request. *See General Explanation of the Tax Reform Act of 1976, supra*, at 415.

501(c)(3) organizations. For a public charity making the section 501(h) election, the allowable amount of lobbying expenditures that can be made for any tax year is determined under a sliding-scale formula. Specifically, the allowable amount of all lobbying (i.e., direct and grass roots lobbying combined) is limited to the sum of (1) 20 percent of the first $500,000 of the organization's exempt purpose expenditures[77] for the year, (2) 15 percent of the next $500,000 of such expenditures, (3) 10 percent of the third $500,000 of such expenditures, and (4) 5 percent of any additional such expenditures. In no event, however, can the allowable amount of lobbying for an organization making the section 501(h) election exceed $1 million for any year.[78] Grass roots lobbying is subject to a separate limitation, equal to 25 percent of the overall permissible lobbying amount.[79] In order to prevent organizations from avoiding the dollar limitations of section 501(h) by dividing themselves into technically separate but related entities, section 4911(f) treats certain affiliated organizations under common control as one organization for purpose of applying the section 501(h) arithmetical tests.[80]

If the lobbying expenditures (for either all lobbying or grass roots lobbying in particular) of an organization making the section 501(h) election exceed the allowable amounts under section 4911, then an excise tax penalty is imposed on the organization equal to 25 percent of the excess lobbying expenditures.[81] Imposition of this excise tax penalty under section 4911 may, in some cases, effectively operate as an intermediate sanction short of revocation of the organization's tax-exempt status. However, if the electing organization's lobbying expenditures (for either all lobbying and grass roots lobbying in particular) normally are more than 150 percent of the allowable amounts, then not only will the organization be subject to the excise tax

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[77] For this purpose, "exempt purpose expenditures" are defined as expenditures to accomplish the organization's exempt purposes, including properly allocable salary payments, overhead, an allowance for depreciation on a straight-line basis, and all lobbying expenditures, but not including fundraising costs and certain capital expenditures. Sec. 4911(e)(1); Treas. Reg. sec. 56.4911-4.

[78] Sec. 4911(c)(2).

[79] Sec. 4911(c)(4). In contrast to the arithmetical test for organizations making the section 501(h) election, the substantial part test for non-electing organizations does not focus solely on expenditures made by the organization and it makes no distinction between direct and grass roots lobbying. *See 1997 IRS CPE Text, supra*, at 301; Galston, *supra*, at 1280 (1993) (discussing advantages and disadvantages of sec. 501(h) election for organizations that engage in more grass roots lobbying than direct lobbying or that rely on volunteers for their lobbying).

[80] *See* Treas. Reg. sec. 56.4911-7.

[81] Sec. 4911(a).

penalties under section 4911, but the organization will lose its tax-exempt status.[82]

Definition of lobbying under section 4911.--For purposes of the section 501(h) arithmetical test, lobbying expenditures are defined as "expenditures for the purpose of influencing legislation (as defined in section 4911(d))." Section 4911(d)(1), in turn, defines the term "influencing legislation" as --

> (A) any attempt to influence any legislation[83] through an attempt to affect the opinions of the general public or any segment thereof [i.e., "grass roots lobbying communications"], and
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> (B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation [i.e., "direct lobbying communications"].[84]

However, section 4911(d) specifically excludes from the definition of "influencing legislation" the following activities:

> (A) making available the results of nonpartisan analysis, study, or research;
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> (B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;

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[82] Secs. 501(h)(1) and 501(h)(2)(B). The determination of whether an organization's lobbying expenditures normally exceed 150 percent of the allowable amounts generally is made by comparing the sum of the organization's lobbying expenditures for the determination year and the three preceding years to the sum of the allowable lobbying amounts for those years. Treas. Reg. sec. 1.501(h)-3(b).

[83] "Legislation" includes action by legislative bodies but does not include action by "executive, judicial, or administrative bodies." Treas. Reg. sec. 56.4911-2(d)(3). The term "administrative bodies" includes school boards, housing authorities, sewer and water districts, zoning boards, and other similar Federal, State, or local special purpose bodies, whether elective or appointive. Treas. Reg. sec. 56.4911-2(d)(4).

[84] Lobbying with respect to a referendum or ballot initiative subject to a vote by the general public (unless it comes within the nonpartisan analysis exception) is considered "direct lobbying," based on the rationale that, in this context, members of the general public are functioning as legislators. See Treas. Reg. sec. 56.4911-2(b)(1)(iii).

(C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization [i.e., "self-defense direct lobbying"];

(D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications [which (1) directly encourage members to contact a legislative body in an attempt to influence legislation, or (2) directly encourage members to urge persons other than members to attempt to affect the opinions of the general public or to contact a legislative body in an attempt to influence legislation]; and

(E) any communication with a government official or employee, other than --

(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) a communication the principal purpose of which is to influence legislation.

With respect to communications with legislators and government officials, Treasury regulations provide a two-part test for determining if such a communication by an organization making the section 501(h) election constitutes a "direct lobbying communication." Under this two-part test, a communication with a legislator or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation (provided that the principal purpose of the communication is to influence legislation), will be treated as a "direct lobbying communication" under section 4911 only if the communication both (1) refers to "specific legislation" (meaning legislation that has already been introduced in a legislative body or a specific legislative proposal that the organization either supports or opposes[85]), and (2) reflects a view on such legislation.[86]

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[85] "Specific legislation" may be identified by its formal name, by a widely used term in connection with the legislation, or even by its content or effect. *See 1997 IRS CPE Text*, *supra*, at 296-97.

[86] Treas. Reg. sec. 56.4911-2(b)(1)(ii). The Treasury regulations do not specifically define the term "reflects a view." Instead, the regulations contain examples that are somewhat

With respect to communications with the general public, Treasury regulations provide a three-part test for determining whether such a communication by an organization making the section 501(h) election constitutes a "grass roots lobbying communication." Under this three-part test, a communication with the general public will be treated as a "grass roots lobbying communication" under section 4911 only if the communication: (1) refers to specific legislation; (2) reflects a view on such legislation; and (3) encourages the recipient to take action with respect to the legislation (referred to as a "call to action" requirement) in at least one of four specifically enumerated ways.[87] The first two requirements for "grass roots lobbying communications" generally are interpreted in the same manner as under the two-part test for "direct lobbying" (with an exception described below for certain mass media advertising that is presumed to refer to specific legislation). With respect to the third requirement--i.e., a "call to action"--this requirement is satisfied only if the communication (1) states that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee (provided that the principal purpose of urging contact with such official or employee is to influence legislation), (2) states the address, telephone number, or similar information of a legislator or employee of a legislative body, (3) provides for a petition, tear-off postcard, or similar material for the recipient to communicate with any legislative or government official, or (4) specifically identifies one or more legislators who will vote on the legislation as: opposing the organization's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation.[88] To be considered a "call to action," a communication must satisfy at least one of these four specific tests enumerated in the Treasury regulations.[89] Thus, except in the case of certain mass media advertisements (as described in the following paragraph), no matter how clearly an organization identifies a specific legislative proposal or comments on the merits of that legislation when it communicates with the

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conclusory. One example refers to a "position letter" sent to Congress "to gain support" for specific legislation and explains that this constitutes a "direct lobbying communication." Another example while another example refers to a paper discussing a State's environmental problems but which "does not reflect a view." *See* Treas. Reg. sec. 56.4911-2(b)(4)(I) ex. (1), (3).

[87] Treas. Reg. sec. 56.4911-2(b)(2)(ii).

[88] Treas. Reg. Sec. 56.4911-2(b)(2)(iii). Merely naming the main sponsor(s) of the legislation for purposes of identifying the legislation will not constitute a "call to action." *Id*. A communication that merely identifies one or more legislators who will vote on the legislation as supporting the communication's view (as opposed to identifying legislators as opposing the communication's view, or as being undecided with respect to the legislation, or as being the recipient's representative in the legislature) is not a "grass roots lobbying communication" as long as the communication does not include one of the four specific types of "calls to action." *See* Treas. Reg. sec. 56.4911-2(b)(4)(ii)(A) ex.7; Hopkins, *Charity, Advocacy, and the Law*, *supra*, at 145.

[89] *See 1997 IRS CPE Text*, *supra*, at 300-301 (an exhortation to the public to "oppose" a particular legislative proposal is not, by itself, a "call to action" under sec. 4911).

general public, the absence of a "call to action" means that the communication is not a "grass roots lobbying communication" for purposes of section 4911.[90]

Mass media advertisements.--Under a special rule contained in the section 4911 regulations, certain mass media advertisements that otherwise do not satisfy the three-part test for a "grass roots lobbying communication" may nevertheless be treated as "grass roots lobbying communications." Under this special rule, if, within two weeks before a vote by a legislative body or committee (but not subcommittee) on "highly publicized"[91] legislation, a paid advertisement appears in the mass media (i.e., television, radio, billboards and certain general circulation newspapers and magazines[92]), then such an advertisement will be presumed to be a "grass roots lobbying communication" if it (1) reflects a view on the general subject of such legislation, and (2) either refers to the highly publicized legislation or encourages the public to communicate with legislators on the general subject of such legislation. Treas. Reg. sec. 56.4911-2(b)(5).[93] This presumption may be rebutted if the organization demonstrates that the advertisement is a type of mass media communication regularly made by the organization (without regard to the timing of the legislation) or that the timing of the advertisement was unrelated to the upcoming legislative action. If a mass media advertisement falls outside the special rule of Treasury regulation sec. 56.4911-2(b)(5), or if the special rule applies but the presumption is rebutted, then the general three-part test applies for determining whether the advertisement constitutes a "grass roots lobbying communication."

Discussions of broad social issues.--Consistent with the definitions of "direct lobbying communications" and "grass roots lobbying communications" under section 4911, Treasury regulations provide that "[e]xaminations and discussions of broad social, economic, and similar problems are neither direct lobbying communications under section 56.4911-2(b)(1) nor grass

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[90] *Id* at 298-299.

[91] Treas. Reg. sec. 56.4911-2(b)(5)(iii)(C) provides that "highly publicized" means frequent coverage on television and radio, and in general circulation newspapers, during the two weeks preceding the vote by the legislative body or committee. However, the regulation goes on to state that, even where legislation receives frequent coverage, it is "highly publicized" only if "the pendency of the legislation or the legislation's general terms, purpose, or effect are known to a significant segment of the general public (as opposed to the particular interest groups directly affected) in the area in which the paid mass media advertisement appears." *Id*.

[92] Where an electing organization is itself a mass media publisher or broadcaster, all portions of that organization's mass media publications or broadcasts are treated as paid advertisements in the mass media, except those specific portions that are advertisements paid for by another person. Treas. Reg. sec. 56.4911-2(b)(5)(iii)(B).

[93] *See 1997 IRS CPE Text, supra*, at 308-09 (noting that presumption does not apply if an advertisement appears even one day more than two weeks before a vote; nor does the presumption apply if public pressure from an advertising campaign results in a scheduled vote being canceled).

roots lobbying communications under section 56.4911-2(b)(2) even if the problems are of the type with which government would be expected to deal ultimately." Treas. Reg. sec. 56.4911-2(c)(2).[94] Consequently, lobbying communications do not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as such discussion does not address itself to the merits of a specific legislative proposal and so long as such discussion does not directly encourage recipients to take action with respect to legislation. Id.[95] This treatment of discussions of broad social and policy issues is implicit in the two-part definition of "direct lobbying" and the general three-part definition of "grass roots lobbying," because both definitions require that the communication in question "reflects a view" on a specific legislative proposal (and the general definition of "grass roots lobbying communication" under section 4911 further requires that there be a specific "call to action").[96] Moreover, if a mass media advertisement appearing within two weeks of a vote reflects a view on a general social or policy issue that also is the subject of highly publicized legislation, then the advertisement could be presumed to be a grass roots lobbying communication only if the advertisement also refers to specific legislation or encourages the public to communicate with legislators on the general social or policy issue. Thus, if there is neither a reference to specific legislation nor a mass media "call to action" regarding the general social or policy issue that is also the subject of legislation that is voted on within two weeks, then the public discussion of broad social or policy issues is not a lobbying communication under section 4911.[97]

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[94] The counterpart regulation for private foundations is Treas. Reg. sec. 53.4945-2(d)(4).

[95] For example, Treas. Reg. sec. 56.4911-2(b)(4)(ii)(a) ex.4, points out that an organization could encourage members of the public to send their legislators a coupon to "support a drug free America" without referring to any specific legislation, and this would not be treated as a "grass roots lobbying communication" under the general three-part test. However, if such a communication appeared in a paid mass media advertisement within two weeks of a vote on highly publicized legislation concerning drug abuse, then such a communication potentially could be presumed to be a "grass roots lobbying communication" under Treas. Reg. sec. 56.4911-2(b)(5).

[96] *See 1997 IRS CPE Text, supra,* at 306 n.37 (noting that the exception in the sec. 4911 regulations for discussion of broad social problems was included to provide parity with a pre-existing exception under sec. 4945, but, as a substantive matter, the exception is "superfluous" given the definitions of lobbying communications in the sec. 4911 regulations). *See also* James J. Mcgovern et al., *The Revised Lobbying Regulations--A Difficult Balance*, 41 Tax Notes 1245 (1988) ("[T]he revised definition of grass roots lobbing will reduce or eliminate the need for organizations to depend upon the exception for discussion of broad social, economic, and similar problems.")

[97] As discussed previously, whether or not the discussion is conducted in a manner that furthers an educational or other exempt purpose (or violates the private benefit test) is a separate question.

Statutory exceptions under section 4911.--Even if a communication by an organization meets the definition of a "direct lobbying" or "grass roots lobbying" communication under the general rules described above, the communication nonetheless may be exempt if one of the five statutory exceptions of section 4911(d)(2) apply. The first of these statutory exceptions is "making available the results of nonpartisan analysis, study, or research."[98] With respect to this exception, Treasury Regulation section 56.4911-2(c)(1)(ii) provides that the term "nonpartisan analysis, study, or research" means "an independent and objective exposition of a particular subject matter, including any activity that is 'educational' within the meaning of [Treasury Regulation] section 1.501(c)(3)-1(d)(3)."[99] Treasury Regulation section 56.4911-2(c)(1)(ii) goes on to provide: "Thus, 'nonpartisan analysis, study, or research' may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. The mere presentation of unsupported opinion, however, does not qualify as 'nonpartisan analysis,

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[98] Sec. 4911(d)(2)(A).

[99] Treas. Reg. sec. 1.501(c)(3)-1(d)(3) provides that "an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." In Rev. Proc. 86-43, 1986-2 C.B. 729 (which was issued to address the vagueness concerns identified in the *Big Mama Rag* decision, discussed above), the IRS indicated that its focus in applying Treas. Reg. sec. 1.501(c)(3)-1(d)(3) is not on the viewpoint or position advocated, but rather on the method used by the organization to communicate its viewpoint. Rev. Proc. 86-43 indicates that the method used by the organization "will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process." Further, Rev. Proc. 86-43 indicates that the presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its views is not educational: (1) the presentation of viewpoints unsupported by facts is a significant portion of the organization's communications; (2) the facts that purport to support the viewpoints or positions are distorted; (3) the organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations; and (4) the approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter. However, Rev. Proc. 86-43 goes on to provide that, even if one or more of the above four factors are present, the IRS will look to all facts and circumstances to determine whether an organization nonetheless may be considered "educational." An examination of the factors listed in Rev. Proc. 86-43 is commonly referred to as the "methodology test." *See Nationalist Movement v. Commissioner*, 102 T.C. 558 (1994) (upholding the constitutionality of the methodology test), aff'd 37 F.3d 216 (5th Cir. 1994).

study, or research.'"[100]

Treasury Regulations provide that nonpartisan analysis that reflects a view on specific legislation is not within the section 4911(d)(2)(A) exception if the communication "directly encourages" the recipient to take action--meaning that the communication expressly states that the recipient should contact a legislative or government official or employee, includes the address, telephone number or similar information of a such official or employee, or includes a petition tear-off postcard, or similar material for the recipient to send to such an official or employee. However, nonpartisan analysis within the section 4911(d)(2)(A) exception is allowed to include a limited (or implicit) "call to action" that specifically identifies one or more legislators who will vote on the legislation as (1) opposing the organization's views with respect to the legislation, (2) being undecided with respect to the legislation, (3) being the recipient's representative in the legislature, or (4) being a member of the legislative committee or subcommittee that will consider the legislation.[101]

Under section 4911(d)(2)(A), an organization may choose any suitable means, including oral or written presentations or disseminations to the news media, to distribute its nonpartisan analysis or research. However, communications may not be limited to, or be directed toward, persons who are interested solely in one side of a particular issue (Treas. Reg. sec. 56.4911-2(c)(1)).[102]

The four additional statutory exceptions provided for by section 4911(d)(2) include (1) providing technical advice or assistance upon written request from a governmental body,[103] (2)

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[100] As discussed in more detail below, it is not clear whether the IRS intends to use the arguably stricter "full and fair exposition" test with respect to advocacy involving legislation, or whether satisfying the "methodology" test of Rev. Proc. 86-43 (which can be viewed as a subset of the "full and fair exposition" test) would suffice, even if both sides of the debate on a legislative issue are not presented. It is also questionable whether use of the "full and fair exposition" test (without the overlay provided by the "methodology" test) for judging advocacy with respect to legislation would be constitutionally permissible in view of the *Big Mama Rag* decision. *But see Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). *Compare Nationalist Movement v. Commissioner*, 102 T.C. at 587 n.17 (noting that it is doubtful that the IRS could require the presentation of opposing views) with *Fund for the Study of Econ. Growth & Tax Reform v. I.R.S.* 997 F. Supp. 15 (D.D.C. 1998) (finding that the organization did not conduct nonpartisan analysis, but the court did not refer to either the "full and fair exposition" test or the "methodology" test), 161 F.3d 755 (1998).

[101] Treas. Reg. secs. 56.4911-2(b)(2)(iii) and 56.4911-2(c)(1)(vi).

[102] *See 1997 IRS CPE Text, supra*, at 302-03.

[103] Under this exception, the request for assistance or advice must be made in the name of the requesting governmental body, committee, or subdivision rather than an individual member

so-called self-defense direct lobbying--that is, communications with a legislative body with respect to a possible decision by the body which might affect the existence of the organization, its powers and duties, or its tax-exempt status, or the deduction of contributions to the organization,[104] (3) communications between an organization and its bona fide members, provided that the communication does not directly encourage the members to contact legislators or to urge nonmembers to influence legislation,[105] and (4) communications with government officials or employees, provided that the communication is not a direct lobbying communication with a member or employee of a legislative body and, in the case of other government officials, does not have the principal purpose of influencing legislation.[106]

Cost allocations.--In addition to defining direct and grass roots lobbying communications and the five statutory exceptions, Treasury regulations issued under section 4911 provide detailed guidance for allocating particular expenditures to lobbying communications. In general, public charities making the section 501(h) election are required to treat as lobbying expenditures all direct costs of producing the communication, as well as an allocable share of overhead costs.[107] In addition, rules are provided for so-called "mixed purpose" expenditures and for allocating costs when non-lobbying materials (e.g., nonpartisan analysis) subsequently are used by an

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thereof; and the response to such request must be made available to every member of the requesting body, committee, or subdivision. Treasury regulations further provide that because such assistance or advice may be given only at the express request of a governmental body, the oral or written presentation of such assistance or advice need not qualify as nonpartisan analysis, study or research. The offering of opinions or recommendations will ordinarily qualify under this exception only if such opinions or recommendations are specifically requested by the governmental body or are directly related to the materials so requested. *See* Treas. Reg. secs. 56.4911-2(c)(3) and 53.4945-2(d)(2).

[104] *See* Treas. Reg. secs. 56.4911-2(c)(4) and 53.4945-2(d)(3); *1997 IRS CPE Text*, *supra*, at 307-08.

[105] Treas. Reg. sec. 56.4911-5. For purposes of this exception, the term "directly encourage" has the same meaning as for the nonpartisan analysis exception. *See* Treas. Reg. sec. 56.4911-5(f)(6)); *1997 IRS CPE Text, supra*, at 314-17. A communication between an organization and a member of the organization which directly encourages the member to engage in direct lobbying of a member of employee of a legislative body is considered a direct lobbying communication (unless the self-defense exception applies). *See* sec. 4911(d)(3)(A); Treas. Reg. sec. 56.4911-5(f)(6)(B).

[106] When a communication is with government official or employee who is not a member of (or employed by) a legislative body, then the costs of the communications are taken into account under section 4911 only if the principal purpose of the communication is to influence legislation. *See General Explanation of Tax Reform Act of 1976, supra*, at 410.

[107] Treas. Reg. sec. 56.4911-3(a)(1).

organization as part of a grass roots lobbying campaign.[108]

Penalties applicable to private foundations.--For purposes of determining whether a private foundation should have its exemption revoked, the substantial part test under section 501(c)(3) continues to apply. As a separate issue, private foundations and their managers are potentially subject to excise taxes under section 4945 (as described above), if any expenditures are made for either direct or grass roots lobbying. Lobbying activities may be subject to tax under section 4945 even in cases where such activities are not substantial relative to the private foundation's other activities.[109] For purposes of section 4945, lobbying is defined in a manner similar to the definition under section 4911(d). Specifically, as under section 4911(d)(2), the section 4945 penalty excise taxes do not apply to (1) making available the results of nonpartisan analysis, study, or research, (2) providing technical advice to a governmental body in response to a written request, or (3) direct lobbying of a legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation.[110]

Penalties applicable to public charities.--For public charities making the section 501(h) election, there is an intermediate sanction of an excise tax penalty that may be imposed in cases in which an organization exceeds the so-called "lobbying nontaxable amount" (or "grass roots nontaxable amount") but the organization does not normally exceed the numeric limits by more than 150 percent.[111] In cases in which the electing public charity does not normally exceed the lobbying nontaxable amount by more than 150 percent, an excess tax penalty may be imposed under section 4911, but the charity's tax-exempt status may not be revoked due to the lobbying activity. In contrast, for non-electing public charities, there is no excise tax penalty that can be imposed as an intermediate sanction (i.e., in lieu of revocation of the organization's tax exempt status) due to the charity's lobbying activities. In 1987, Congress enacted section 4912, which

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[108] Treas Reg. secs. 56.4911-2(b)(2)(v) and 56.4911-3(a)(2); *1997 IRS CPE Text, supra,* at 304-06. *See also* Hopkins, *Charity, Advocacy, and the Law, supra,* at 155-57.

[109] *Id.* at 49. Although the section 4945 excise tax conceptually could be viewed by private foundations as a "cost of doing business" in situations where the foundation wants to engage in insubstantial lobbying (without meeting one of the statutory exceptions), private foundations generally have not adopted this view. *See* Galston, *supra,* at 1278 n.21. In theory, a willful and flagrant lobbying expenditure that leads to imposition of a penalty excise tax under section 4945 also could lead to termination of a private foundation's tax-exempt status due to the operation of section 507(a)(2), even though the lobbying activity might not be "substantial" under section 501(c)(3).

[110] Sec. 4945(e). In contrast to section 4911(d)(2), there is no explicit exception under section 4945(e) for membership communications, because private foundations generally do not have members.

[111] Sec. 501(h)(1).

provides for the imposition of penalty excise taxes due to improper lobbying expenditures made by a non-electing public charity (other than a church). However, the section 4912 excise taxes may be imposed only if the charity ceases to qualify for tax-exempt status under section 501(c)(3) due to its substantial lobbying activities.[112] Section 4912 imposes on such a disqualified organization an excise tax equal to five percent of the amount of lobbying expenditures incurred during the year in which the organization has ceased to qualify under section 501(c)(3) due to making lobbying expenditures. Organization managers who, without reasonable cause, agree to make lobbying expenditures knowing that they are likely to result in revocation of the organization's tax-exempt status under section 501(c)(3) also are subject to an excise tax equal to five percent of such lobbying expenditures.

A section 501(c)(3) organization also may be subject to an excise tax under section 527(f) (discussed in greater detail below) if the organization engages in activity which is "exempt function" activity under section 527 -- broadly meaning attempts to influence the selection of any individual to public office -- even though such activity is not prohibited political campaign intervention under section 501(c)(3) (e.g., attempts by section 501(c)(3) organizations to influence appointments to nonelected public office, such as Supreme Court appointments).[113]

There is no rule preventing an organization that loses its tax-exempt status under section 501(c)(3) because it engages in substantial lobbying (or normally exceeds the section 501(h) ceiling) from applying for restoration of its section 501(c)(3) status in a subsequent taxable year, at which time the organization will again be subject to the lobbying limitation.[114] However, a charitable organization (other than a church) that loses its tax-exempt status under section 501(c)(3) because of excessive lobbying activities may not attempt to thereafter escape the lobbying limitation by being treated as a tax-exempt social welfare organization under section 501(c)(4).[115]

Other organizations

Section 501(c) organizations (other than charities described in section 501(c)(3)) are not subject to any specific provision that restricts their lobbying activities. In general, the only limit imposed by the Internal Revenue Code is that the lobbying activities must be germane to the

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[112] *See* H.R. Conf. Rep. No. 100-495, at 1023 (1987).

[113] *See* Announcement 88-114, 1988-37 I.R.B. 26 (Sept. 12, 1988) (proposing that attempts to influence confirmation of a federal judicial nominee, or other nominee to a nonelective public office, constitute an "exempt function" under sec. 527(e)(2), and soliciting comments from the public on this issue). *But see 1993 IRS CPE Text, supra*, at 448 n.8 (noting that no final determination has been made of this issue).

[114] *See General Explanation of the Tax Reform Act of 1976, supra*, at 414.

[115] Sec. 504(a)(2)(A).

accomplishment of the organization's exempt purposes. For some organizations, such as social welfare organizations or business leagues, lobbying may be the organization's primary, or even sole, activity.[116] It is not uncommon for organizations such as social welfare organizations, labor organizations, and business leagues to conduct substantial lobbying as their primary activity. However, as discussed below, some lobbying activities (i.e., attempts to influence the selection of an individuals to a non-elective public office) potentially could lead to the imposition of tax under section 527(f).

[116] *See* Rev. Rul. 71-530, 1971-2 C.B. 237; Rev. Rul. 61-177, 1961-2 C.B. 117; *1997 IRS CPE Text, supra*, at 261. As discussed above, tax-exempt trade associations and certain other tax-exempt organizations (but not charities described in section 501(c)(3)) generally are required to provide annual information disclosure to members estimating the portion of their dues allocable to lobbying activities, and to political campaign activities, as defined under section 162(e)(1). Sec. 6033(e). Some organizations, such as section 501(c)(19) veterans groups, can engage in virtually unlimited lobbying. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)). Section 501(c)(12) cooperatives and section 501(c)(14) credit unions may lobby as an incidental part of providing their services. Section 501(c)(7) social clubs also may lobby if it furthers their recreational or other nonprofitable purposes. Arguably, substantial lobbying--other than self-defense lobbying--by some tax-exempt organizations could violate the terms of their exemption that they be organized and operated "exclusively" for certain narrow purposes enumerated by statute. *See* Galston, *supra*, at 1276-77 n.18.

B. Section 527 Political Organizations

In general

Section 527 provides a limited tax-exempt status to "political organizations," meaning a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures (or both) for an "exempt function".[117] These organizations are generally exempt from Federal income tax on contributions they receive, but are subject to tax on their investment income and certain other income. Donors generally are exempt from gift tax on their contributions to such organizations. For purposes of section 527, the term "exempt function" means: "the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed".[118] Thus, by definition, the purpose of a section 527 organization is to accept contributions or make expenditures for political campaign (and similar) activities.[119]

The facts and circumstances of each case determine whether a particular Federal, State, or local office is a "public office" for purposes of section 527, although the focus usually is upon whether a significant part of the activities of the office consist of the independent performance of policy-making functions.[120] "Exempt function" activities for purposes of section 527 include not only attempts to influence voting with respect to elective public or political offices but also may include attempts to influence selections or appointments of individuals to non-elective public or

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[117] Sec. 527(e)(1). A political organization for purposes of section 527 need not be formally organized as a separate legal entity. A separate bank account in which political campaign funds are deposited and disbursed for political campaign expenses can qualify as a political organization. *See* Rev. Rul. 79-11, 1979-1 C.B. 207. A separate statutory rule provides section 527 status to certain newsletter funds. Sec. 527(g).

[118] Sec. 527(e)(2). The term "exempt function" also includes the making of expenditures relating to a Federal, State, or local public office or office in a political organization which, if incurred by the individual occupying that office, would be allowable as a trade or business expense deduction under section 162(a). Sec. 527(e)(2).

[119] Sec. 527(e). A political organization means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures to influence or attempt to influence the selection, nomination, election, or appointment or any individual to any Federal, State, or local public office or office in a political organization, of the election or Presidential or Vice-Presidential electors.

[120] *See* Treas. Reg. secs. 1.527-2(d) and 53.4946-1(g)(2).

political offices. If so, the scope of "exempt function" activities under section 527 would be broader than the "political campaign" activities that are impermissible for section 501(c)(3) organizations.[121]

Limited tax exemption under section 527

Section 527 exempts from taxation certain "exempt function income" (i.e., contributions, dues, proceeds from political fundraisers or the sale of campaign materials, and proceeds from bingo games) but only to the extent such income is segregated for use only for an "exempt function" of a political organization.[122] Thus, no entity-level income tax is imposed on contributions (and certain other "exempt function" income) received by a political organization which are used for electioneering or other "exempt function" activities (as defined in section 527).[123] However, a political organization's investment income and any other non-exempt function income (e.g., income from events that are not political in nature),[124] minus expenses

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[121] *See* Notice 88-76, 1988-2 C.B. 392, and Announcement 88-114, 1988-37 I.R.B. 26 (Sept. 12, 1988). Treas. Reg. 1.527-6(b)(4) suggests that attempts to influence appointments to nonelected public offices generally are "exempt function" activities under section 527, by providing a specific exemption for an appearance by section 501(c) organization before a legislative body in response to a written request for the purpose of influencing the appointment or confirmation of an individual to a public office. *But see 1995 ABA Comments, supra*, at 31 (arguing that "exempt function" under sec. 527(e)(2) should be interpreted as not applying to activities to influence selections to non-elected public offices). In this regard, it should be noted that the Senate passed an amendment to the Technical and Miscellaneous Revenue Act of 1988, which would have statutorily provided that attempts to influence the selection of an individual to a non-elected public office are not "exempt function" activities for purposes of section 527(f). In conference, this provision was dropped from the 1988 Act.

[122] *See* secs. 527(c)(1)(A) and 527(c)(3); Treas. Reg. sec. 1.527-3 (providing examples of exempt function income).

[123] Expenses incurred in conducting an "exempt function" activity under section 527 may be either directly or indirectly related to such activity, including expenses related to activities engaged in between elections to support the next political campaign and fundraising activities. *See* Treas. Reg. sec. 1.527-2(c). As one example, Treasury regulations provide that expenses for voice and speech lessons to improve a candidate's skills are for an "exempt function" (Treas. Reg. sec. 1.527-2(c)(5)(iii)). *See also* Rev. Rul. 79-13, 1979-1 C.B. 208 (expenses for voter research and public opinion polls are "exempt function" expenses under sec. 527, provided that there is a nexus with an election). An "exempt function" also generally includes an activity which is in furtherance of the process of terminating a political organization's existence. *See* Treas. Reg. sec. 1.527-2(c)(3).

[124] *See* Treas. Reg. sec. 1.527-3(d); Rev. Rul. 80-103, 1980-1 C.B. 120 (income of political organization from sale of art reproductions was not exempt function income for purposes of sec.

directly connected with the production of such income,[125] is subject to tax at the highest corporate income tax rate (currently 35 percent).

Amounts expended by a political organization described in section 527 for an exempt function are not income to the individual (i.e., the candidate) on whose behalf such expenditures are made. However, if a political organization expends any other amount for the personal use of any individual (e.g., if a political organization pays a personal legal obligation of the candidate), the individual on whose behalf the amount is expended must include such amount in his or her gross income.[126] Excess funds controlled by a political organization after a campaign are includible in the gross income of the person having control over the ultimate use of such funds, unless the funds are transferred to another political organization (or to certain public charities or governmental general funds) within a reasonable period of time or are held in reasonable anticipation of being used for a future campaign.[127]

Gift tax implications

Contributions to political organizations described in section 527 are specifically exempted from the Federal gift tax.[128] Contributions to charities are likewise exempt from the Federal gift tax, but there is no similar statutory exemption from the Federal gift tax for contributions to social welfare organizations described in section 501(c)(4).[129]

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527). *See also 1993 IRS CPE Text, supra*, at 458-59.

[125] *See* Treas. Reg. sec. 1.527-4(c). In computing taxable income, a political organization is allowed a specific deduction of $100 under section 527(c)(2)(A).

[126] *See* Treas. Reg. sec. 1.527-5(a)(1). If a political organization contributes any amount to any other political organization, to or for the use of certain public charities, or to the general fund of the Federal, State, or local government, then such amount will not be treated as expended for the personal use of the candidate or any other person. Treas. Reg. sec. 1.527-5(b).

[127] Treas. Reg. sec. 1.527-5(c)(1).

[128] Sec. 2501(a)(5). A special rule provides, however, that the contributor's gross income for income tax purposes will include the built-in gain in any appreciated property contributed to political organizations. Sec. 84.

[129] Sec. 2522(a)(2). *See* Rev. Rul. 82-216 C.B. 1982-1 C.B. 220 ("The Service continues to maintain that gratuitous transfers to persons other than organizations described in section 527(e) of the Code are subject to the gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor's own social, political, or charitable goals.") However, with respect to political contributions made prior to the enactment of sections 527 and 2501(a)(5) in 1974, two courts held that such contributions were not within the purview of the Federal gift tax regime. *See Carson v. United States*, 641 F.2d 864 (10th Cir. 1981); *Stern v.*

Disparity between definition of "exempt function" activities under section 527 and Federal election law "express advocacy" standard

In determining whether a particular activity is an "exempt function" activity under section 527, the IRS examines all relevant facts and circumstances to determine the relationship (that is, whether there is a nexus) between the activity and the statutory definition of "influencing or attempting to influence" the election of an individual to a public or political office.[130] Generally, expenditures incurred for any activity that supports an individual's campaign are treated as an "exempt function" expenditure under section 527,[131] regardless of whether the particular activity involves "express advocacy" as that term is defined for Federal election law purposes.[132] For

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United States, 436 F.2d 1327 (5th Cir. 1971). The rationale reflected in the *Carson* and *Stern* decisions--i.e., that the recipient organization or candidate may be viewed for gift tax purposes as a means to the end of the contributor--arguably could be applied to contributions made to fund advocacy activities ("express advocacy" or "issue advocacy") of section 501(c)(4) organizations.

[130] *See 1993 IRS CPE Text, supra*, at 448-49; TAM 9320002 (Jan. 14, 1993). *See generally* Milton Cerny and Frances R. Hill, *Political Organizations*, 13 Exempt. Org. Tax Review 591, 596-97 (1996) (explaining that the determination of whether a particular expenditure constitutes an "exempt function" expenditure depends on whether there is a nexus with an election, nomination, or selection process, based on an examination of the facts and circumstances of each case, and does not depend on any intrinsic qualities of the event at which expenditures are incurred).

[131] *See* TAM 9130008 (April 16, 1991) (ruling that distributing campaign material promoting a statewide referendum, which displayed a candidate's name and picture and identified him as a leader on the issue, but did not specifically mention his candidacy since he was not an announced candidate at the time, was "exempt function" activity under sec. 527).

[132] Although some uncertainty remains, courts generally have held that only communications that contain express words advocating the election or defeat of a political candidate--so-called "express advocacy"--are subject to the requirements of the Federal Election Campaign Act (FECA), which includes restrictions on contributors who are eligible to fund such communications (i.e., corporations, unions, and foreign persons are prohibited from making contributions), dollar contribution limits for individual contributors, and public disclosure requirements for funds raised and spent for such communications. *See Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Maine Right to Life Committee v. Federal Election Commission*, 98 F.3d 1 (1st Cir. 1996); *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). *But see Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); FEC regulation 11 C.F.R. sec. 100.22 (1995) (providing that "express advocacy" includes communications which, when taken as a whole, reasonable persons could not differ as to whether it encourages actions to elect or defeat a clearly identified candidate). Communications that fall outside of the FECA definition of "express advocacy" are commonly referred to as "issue advocacy." *See generally* CRS, *Campaign Finance*

purposes of section 527, "exempt function" expenditures need not be related to a particular candidate or office holder's campaign, but can relate to attempts to influence voting on multiple (announced or unannounced) candidates.[133]

In a series of recent private letter rulings ("PLRs"), the IRS has recognized the "political organization" status under section 527 of organizations that are specifically prohibited (either by their charter or by a resolution adopted by their board of directors) from expressly advocating the election or defeat of any particular candidate.[134] In these private letter rulings, the organizations represented that their primary activity would be conducting voter education efforts and grass roots lobbying (commonly referred to as "issue advocacy"), the content, timing, and geographic targeting of which was intended to influence recipients to favor the organization's view when voting for candidates. The IRS ruled that, because such biased voter education activities constituted political campaign intervention under long-standing interpretations of section 501(c)(3), such activities were, in turn, "exempt function" activities under section 527.[135] The organizations themselves sought section 527 status, apparently to clarify that their donors would be immune from Federal gift tax liability, while simultaneously preserving the organization's ability to assert (for non-tax purposes) that their implied approval or disapproval of candidates was beyond the reach of the Federal election laws.[136]

Other tax-exempt organizations

Section 527(f) provides that if any tax-exempt organization described in section 501(c) makes expenditures for an "exempt function" activity (within the meaning of sec. 527(e)(2)), then the organization's net investment income, up to the amount of the "exempt function"

Reform: A Legal Analysis of Issue and Express Advocacy (98-282A, updated May 15, 1998); CRS, *Soft and Hard Money in Contemporary Elections: What Federal Law Does and Does Not Regulate* (97-91 GOV, Jan. 10, 1997). Nevertheless, communications that constitute unregulated "issue advocacy" for FECA purposes may constitute "exempt function" activities for purposes of section 527. In addition, whereas FECA applies only to Federal elections, section 527 applies to attempts to influence elections of individuals to Federal, State, or local public offices.

[133] *See* Treas. Reg. sec. 1.527-2(c)(5)(viii) ex.8; *1993 IRS CPE Text*, *supra*, at 449-51.

[134] *See* PLR 9808037 (Nov. 21, 1997); PLR 9725036 (March 24, 1997); PLR 9652026 (Oct. 1, 1976).

[135] In PLR 9808037 (Nov. 21, 1997), the IRS stated: "It follows that any activities constituting prohibited political intervention by a section 501(c)(3) organization are activities that must be less than the primary activities of a section 501(c)(4) organization, which are, in turn, activities that are exempt functions for a section 527 organization." *See also* PLR 1999-25051 (March 29, 1999).

[136] *See* sec. 2501(a)(5).

expenditures, will be subject to tax (at the highest corporate income tax rate). For purposes of section 527(f), a separate segregated fund (meeting certain criteria) maintained by a section 501(c) organization is treated as a separate organization.[137]

The provisions of subsection 527(f) operate to ensure that tax-free investment income of a tax-exempt organization described in section 501(c) is not used to pay for "exempt function" activities within the meaning of section 527. In this way, section 527 political organizations and section 501(c) organizations receive similar treatment with respect to their electioneering activities. The section 527(f) tax applies regardless of whether there is any direct tracing of the section 501(c) organization's investment income to "exempt function" expenditures within the meaning of section 527.[138] As a result, section 527 "exempt function" activities cannot be directly or indirectly subsidized with tax-free investment income.[139]

The same definition of "exempt function" provided for in section 527(e)(2) generally applies for purposes of defining both the permissible tax-free activities of political organizations and the activities of 501(c) organizations which may result in imposition of tax under section 527(f). However, Treasury regulations specifically provide that, in the case of a tax-exempt organization described in section 501(c), expenditures for nonpartisan voter registration and "get-out-the-vote" campaigns not specifically identified with any candidate or political party do not constitute "exempt function" expenditures and, thus, will not lead to tax under section

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[137] Sec. 527(f)(3).

[138] Any investment income of a section 501(c) organization that already is subject to unrelated business income tax is disregarded so that it is not subject to double taxation. Sec. 527(f)(2).

[139] However, section 527(f) does not, in all situations, prevent other tax-free monies from being used to subsidize "exempt function" activities within the meaning of section 527. For instance, a section 501(c)(3) charity which has no (or insignificant) investment income could use tax-deductible charitable contributions (assuming that the contributions were not earmarked for lobbying) to finance attempts to influence a judicial nomination, which may be an "exempt function" activity under section 527. As another example, a nonprofit organization that is exempt from the section 6033(e) flow-through information disclosure and proxy-tax requirements (because substantially all dues paid to the organization are not deductible to the payor) may receive dues from a small fraction of its members who, in fact, deduct such dues as a trade or business expense. If such an organization makes "exempt function" expenditures within the meaning of section 527 in excess of its net investment income, than some of the excess "exempt function" expenditures could be partially funded with tax-free monies (i.e., a minority of the dues-paying members deducted their dues payments and the organization did not pay an entity-level tax on such amounts, which were used to fund electioneering).

527(f).[140] Treasury regulations also provide that when a tax-exempt organization described in section 501(c) appears before any legislative body in response to a written request by such body for the purpose of influencing the appointment or confirmation of an individual to a public office, any expenditure directly related to such appearance is not treated as an "exempt function" expenditure under section 527.[141] In addition, expenditures made by a section 501(c) organization which are otherwise allowable under the Federal Election Campaign Act (FECA) or similar State statute are treated as being incurred for an "exempt function" only to the extent provided in Treas. Reg. sec. 1.527-6(b)(3).[142]

Use of separate segregated funds

Subsection 527(f)(3) provides that certain separate segregated funds, such as a political action committee ("PAC"), established by tax-exempt organizations will be treated as separate organizations. In essence, the separate segregated fund is taxed as if it were a separate political organization.[143] An organization may establish a separate segregated fund only if this is

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[140] Treas. Reg. sec. 1.527-6(b)(5). It is not clear whether the same expenditures if incurred by a section 527 political organization would constitute "exempt function" expenditures. Treas. Reg. sec. 1.527-2(a)(3) provides that a political organization does not conduct "exempt function" activities when it sponsors "nonpartisan educational workshops which are not intended to influence" the election of candidates. *See also 1993 IRS CPE Text, supra*, at 450. Nevertheless, expenses of voter registration activities could be considered indirect "exempt function" expenses (regardless of intent) under Treas. Reg. sec. 1.527-2(c)(2), which provides that expenses for an "exempt function" activity include expenses "which are necessary to support the directly related activities of the political organization," such as overhead, record keeping, and fundraising expenses.

[141] Treas. Reg. secs. 1.527-2(c)(5)(vi) and 1.527-6(b)(4). This exception for providing technical advice applies only to expenditures which are directly related to appearances before a legislative body to influence the appointment or confirmation or a nominee for public office. Apparently, this exception is similar to, but more limited than, the "furnishing technical advice or assistance" exception relating to legislative lobbying under sections 4911(2)(B) and 4945(e)(2), which applies to furnishing technical advice to a governmental body by providing an oral or written presentation. *See* Treas. Reg. secs. 56.4911-2(c)(3) and 53.4945-2(d)(2); *1993 IRS CPE Text, supra*, at 482 n.11.

[142] Treas. Reg. sec. 1.527-6(b)(3) has not yet been issued, however, and is therefore "reserved."

[143] In enacting section 527, Congress expected that, to avoid taxation on investment income not used for "exempt function" activities within the meaning of section 527, section 501(c) organizations would establish separate funds that would operate primarily as political organizations and directly receive and disburse funds for section 527 activities. See S. Rep. No. 93-1357, at 29 (1974).

consistent with its tax-exempt status.[144] Thus, a section 501(c)(3) charity may not establish a PAC or other separate fund to engage in political campaign intervention, but may establish a separate fund to attempt to influence nominations to non-elected public offices (provided that this activity and other lobbying activities are not substantial).

The separate-fund rule provided by subsection 527(f)(3) does not reduce the section 527(f) tax to a mere formality which can be avoided by an organization described in section 501(c) simply establishing a separate fund and transferring monies at any time (perhaps including investment income) to that separate fund. The section 527(f) tax applies if an organization either directly expends amounts for an exempt function activity or does so indirectly "through another organization."[145] However, consistent with the legislative history to section 527,[146] transfers of political contributions by a section 501(c) organization to a separate segregated fund are not treated as "exempt function" expenditures by the transferor organization if the transfer is made "promptly and directly" (under procedures permitted by Federal or State campaign laws) after the contributions are received by the transferor organization from third-party contributors.[147] In such cases, the section 501(c) organization is treated as a mere conduit for the transfer of political contributions from a third party to the separate segregated fund, and the subsequent expenditures of the separate segregated fund will not be attributed to the affiliated 501(c) organization.[148]

C. Limitations on Charitable Contributions Deductions For Lobbying

In general, the fact that a section 501(c)(3) charity engages in some lobbying activities,

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[144] Treas. reg. sec. 1.527-6(f).

[145] Sec. 527(f)(1).

[146] *See* Conf. Rpt. No. 93-1642, at 30 (1974).

[147] *See* Treas. Reg. sec. 1.527-6(e).

[148] *See* PLR 9245001 (June 8, 1992) (quarterly transfer of political contributions to a separate segregated fund were made "promptly and directly" within the meaning of Treas. Reg. sec. 1.527-6(e)); GCM 39837 (May 22, 1990) (contributions designated for an affiliated PAC that were received and temporarily deposited in an interest bearing checking account by 501(c)(5) and 501(c)(6) organizations were transferred to the separate segregated fund "promptly and directly"); TAM 8628001(Feb. 7, 1986) (labor organization did not earmark certain percentage of member's dues to be used for political purposes, but transfer of funds from general accounts into segregated accounts for state election purposes was a qualifying transfer for sec. 527 purposes). *But see Alaska Public Service Employees Local 71 v. Commissioner*, T.C. Memo. 1991-650 (1991) (transfer of monies by labor organization to separate political fund constituted political expenditure by labor organization itself because transfer was made from undesignated funds and no showing that transfer consisted solely of dues and not of investment income). *See generally* Cerny & Hill, *supra*, at 609-10.

but only to the extent consistent with remaining exempt under that section, has no effect on the charitable contribution deductions of taxpayers making contributions to the charity. However, Treasury regulations provide that contributions to a charity that are specifically earmarked for lobbying are not allowable as charitable contribution deductions.[149] In addition, section 170(f)(6) provides that no charitable contribution deduction is allowed for an out-of-pocket expenditure made by any person on behalf of a charity--other than a church--if the expenditure is made for the purpose of influencing legislation (within the meaning of section 501(c)(3)).

Furthermore, section 170 was amended by Congress in 1993 to prevent donors from using charities as a conduit to conduct legislative activities, the cost of which would not be deductible if conducted directly by the donor. No charitable contribution deduction is allowed for amounts contributed to a charity that conducts lobbying activities (as defined in section 162(e)(1)) if (1) the charity's lobbying activities regard matters of direct financial interest to the donor's trade or business, and (2) a principal purpose of the contribution is to avoid the general disallowance rule under section 162 that would apply if the contributor directly had conducted such lobbying activities.[150] This anti-abuse rule is designed to prevent taxpayers from evading the rules under section 162(e)--which do not contain an exception for nonpartisan analysis--by simply contributing funds to a charity that, in turn, conducts nonpartisan analysis of legislative proposals affecting the contributor's trade or business.[151]

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[149] Treas. Reg. sec. 1.170A-1(h)(6) provides: "No deduction shall be allowed under section 170 for expenditures for lobbying purposes, the promotion or defeat of legislation, etc. See also the regulations under sections 162 and 4945." *See also* Rev. Rul. 80-275, 1980-2 C.B. 69. Because section 501(c)(3) organizations cannot engage in political campaign intervention, a contribution earmarked for such political campaign purposes likewise would not be allowable as a charitable deduction.

[150] Sec. 170(f)(9).

[151] Prior to the 1993 Act amendments, Code section 162(e) disallowed deductions for amounts paid for political campaign activities or grass roots lobbying. However, a deduction was allowed for all ordinary and necessary business expenses incurred in direct connection with lobbying legislative bodies with respect to legislation of direct interest to the taxpayer. Prior to 1993, a deduction also was permitted for business expenses incurred in direct connection with the communication of information between a taxpayer and an organization of which he is a member (and for dues payments) with respect to legislation of direct interest to the taxpayer and organization. In 1993, Congress repealed the deduction previously allowed under section 162 for certain "direct lobbying" expenses, except that expenses for direct lobbying before local councils continues to be deductible if related to legislation of direct interest to the taxpayer. See sec. 162(e)(2). At the Federal level, however, the section 162(e) nondeductibility rule applies not only to direct and grass roots lobbying to influence legislation, but also to contacting certain high-ranking Federal executive branch officials in an attempt to influence their official actions or positions. *See* sec. 162(e)(1)(D).

III. PRESENT LAW DISCLOSURE RULES RELATING TO POLITICAL AND LOBBYING ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS

A. Overview of Present-Law Filing Requirements and Disclosure Rules for Tax-Exempt Organizations

1. Overview of present-law filing requirements for tax-exempt organizations and section 527 organizations

Recognition of tax-exempt status

Under present law, section 501(c)(3) organizations generally are required to notify the IRS of their tax-exempt status by filing an application for recognition of tax-exempt status.[152] Certain section 501(c)(3) organizations, including churches, certain church-related organizations, and organizations (other than private foundations) the gross receipts of which in each taxable year are normally not more than $5,000, and subordinate organizations (other than private foundations) to other tax-exempt organizations that are covered by a group exemption letter, are not required to notify the IRS of their tax-exempt status.[153] Section 501(c)(3) organizations comply with the notification requirement by filing Form 1023 (Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code.) Contributions to section 501(c)(3) organization that are subject to the notification requirement are not deductible from income, gift, or estate tax until the organization receives a determination letter from the IRS.[154]

Other organizations described in section 501(c) generally are not subject to the Code's mandatory notice requirements and, therefore, are not required to notify the IRS that they are seeking recognition of their tax-exempt status.[155] Such organizations may voluntarily file exemption applications in order to establish their qualifications for tax exemption with the IRS. Such organizations file Form 1024 (Application for Recognition of Exemption Under Section 501(a)). Because such organizations generally are not required to notify the IRS of their tax-exempt status, there is no specific time requirement for such organizations to file Form 1024 and such organizations are presumed to be tax exempt from the date of their formation.

Section 527 organizations are subject to no notification requirement when they are

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[152] Sec. 508.

[153] Sec. 508(c).

[154] Sec. 508(d)(2)(B).

[155] Section 501(c)(9) voluntary employees' beneficiary associations and section 501(c)(17) employee supplemental unemployment compensation benefits trusts also must apply to the IRS for recognition of tax-exempt status. Sec. 505(c).

formed and there is no separate application for recognition of status as a section 527 organization. However, an organization wishing to receive confirmation of its status as a section 527 organization may request a written determination from the IRS in the form of a private letter ruling.

Annual filing requirements

Form 990

Tax-exempt organizations generally are required to file an annual information return with the IRS. An organization that has not received a determination of its tax-exempt status, but that claims tax-exempt status under section 501(a), is subject to the same annual reporting requirements and exceptions as organizations that have received a tax-exemption determination.

Most tax-exempt organizations are required to file annually Form 990 (Return of Organization Exempt From Income Tax).[156] Section 501(c)(3) organizations that are classified as public charities must file Form 990 and an additional form, Schedule A, which requests information specific to section 501(c)(3) organizations. An organization that is required to file Form 990, but that has gross receipts of less than $100,000 during its taxable year, and total assets of less than $250,000 at the end of its taxable year, may file Form 990-EZ instead of Form 990. Private foundations are required to file Form 990-PF rather than Form 990.[157]

On the applicable annual information return, organizations are required to report their gross income, information on their finances, functional expenses, compensation, activities, and other information required by the IRS in order to review the organization's activities and operations during the previous taxable year and to review whether the organization continues to meet the statutory requirements for exemption.

The requirement of filing an annual information return does not apply to several categories of tax-exempt organizations. Organizations excepted from the filing requirement include: churches, their integrated auxiliaries, and conventions or associations of churches; certain organizations (other than private foundations), the gross receipts of which in each taxable

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[156] Certain organizations file special forms. For example, black lung trusts described in section 501(c)(21) file form 990-BL.

[157] Form 990-PF requires, among other things: information about the foundation's gross income for the year; information about expenses attributable to such income; information about disbursements for exempt purposes; information about total contributions and gifts received, and the names of all substantial contributors; names, addresses, and compensation of officers and directors; an itemized statement of securities and other assets held at the close of the year; an itemized statement of all grants made or approved; and information about whether the organization has complied with the restrictions applicable to private foundations (secs. 4941-4945).

year are normally not more than $25,000; the exclusively religious activities of any religious order; section 501(c)(1) instrumentalities of the United States; section 501(c)(24) trusts described in section 4049 of the Employer Retirement Income Security Act of 1974; an interchurch organization of local units of a church; certain mission societies; and certain church-affiliated elementary and high schools.[158]

Other filing requirements for section 501(c) organizations

Any organization that is subject to UBIT and that has $1,000 or more of gross unrelated business taxable income must file Form 990-T (Exempt Organization Business Income Tax Return). An organization described in section 501(c) must file Form 1120-POL (U.S. Income Tax Return for Certain Political Organizations) for any year in which it has net investment income and expends any amount to influence the selection, nomination, election or appointment of any individual to office, unless either the amount of such expenditures or the organization's net investment income does not exceed $100 for the taxable year. Public charities that make the section 501(h) lobbying election and that incur tax for excess lobbying expenditures must also file Form 4720. Tax-exempt organizations generally must file reports and returns applicable to taxable entities with respect to Social Security taxes and (with the exception of section 501(c)(3) organizations) Federal unemployment taxes.

Filing requirement for section 527 organizations

A non-section 501(c)(3) organization also is required to file Form 1120-POL (U.S. Income Tax Return for Certain Political Organizations) if the organization's political expenditures and net investment income both exceed $100 for the year. If a non-section 501(c)(3) organization establishes and maintains a section 527(f)(3) separate segregated fund, the fund is required to file Form 1120-POL.

Section 527 political organizations are not required to apply for tax-exempt status and are not required to file Form 990. If the section 527 political organization has taxable income, it is required annually to file Form 1120-POL; similarly, if the political organization does not have taxable income, the Form 1120-POL is not required to be filed. The Form 1120-POL is not publicly disclosable under present law.

2. Overview of present-law disclosure rules for tax-exempt organizations

Three Code sections (sections 6103, 6104, and 6110) and the Freedom of Information Act (the "FOIA") govern the disclosure of information relating to tax-exempt organizations.[159]

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[158] Sec. 6033(a)(2)(A); Treas. reg. sec. 1.6033-2(a)(2)(i); Treas. reg. sec. 1.6033-2(g)(1).

[159] The Privacy Act, which was enacted in 1974 to regulate the collection, use, dissemination, and maintenance of personal information about individuals by Federal agencies,

Section 6103 provides a general rule that tax returns and return information generally are not subject to public disclosure.[160] Given the broad definitions of returns and return information, much tax-exempt organization information comes within the ambit of section 6103. However, in order to allow the public to scrutinize the activities of tax-exempt organizations, section 6104 grants an exception to the confidentiality rule of section 6103 for certain categories of tax-exempt organization documents and information. Thus, section 6104 permits the release in unredacted form of approved applications for tax-exempt status, certain related documents, and annual information returns filed by tax-exempt organizations. As a general rule, to the extent section 6104 specifically provides for the disclosure of tax-exempt organization information, other disclosure provisions (sections 6103, 6110, or the FOIA) do not apply.[161] If tax-exempt organization information does not come within the scope of section 6104, other disclosure provisions will govern whether the information may be disclosed.

Section 6110 provides that written determinations (e.g., private letter rulings) by the IRS and related background file documents generally are open to public inspection in redacted form. Section 6110 does not apply to any matter to which section 6104 applies.[162] As discussed more fully below, IRS regulations have interpreted this restriction to apply to some written determinations and other documents relating to tax-exempt organizations that are not subject to disclosure under section 6104. Thus, some written determinations regarding tax-exempt organization issues are not disclosable under either section 6110 or 6104.

The FOIA provides a rule of general disclosure of information by government agencies upon request. Generally, the FOIA provides that any person has a right of access to Federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. Most courts have taken the position that section 6103 qualifies as one of the nine

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does not apply to persons other than individuals. Therefore, the Privacy Act is inapplicable to tax-exempt organizations.

[160] Sec. 6103(a). A "return" includes any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for, or permitted under the provisions of the Code, which is filed with the IRS. Sec. 6103(b)(1). "Return" also includes any amendment or supplement to the filed return. Sec. 6103(b)(1). "Return information" is defined broadly to include any data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, or liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense under the Code. The term "return information" does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Sec. 6103(b)(2)(A).

[161] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.9.1(8).

[162] Sec. 6110(k)(1).

statutory exemptions to the FOIA; thus, information that contains returns or return information within the meaning of section 6103 typically cannot be disclosed pursuant to a FOIA request. There has been substantial litigation, however, over whether documents not specifically covered by section 6104 may be obtained either under section 6110 or under the FOIA.

3. Section 6104: disclosure of applications for recognition of tax exemption and annual information returns

Disclosure to the public

Under present law, section 501(c) organizations are required to make a copy of their application for recognition of tax-exempt status[163] (and certain related documents) and their annual information return (Form 990 or Form 990-PF) available for inspection by any individual during regular business hours at the organization's principal office or any regional or district office that has three or more employees.[164] Organizations are not required to disclose an application for tax exemption filed by the organization unless the IRS responded favorably to the application.[165] The required disclosure does not include Form 990-T, Exempt Organization Business Income Tax Return, or Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations. In addition, public charities are not required to disclose the names of donors to the organization. Annual information returns must be made available for a three-year period beginning with the due date for the return (including any extension of time for filing).[166]

All tax-exempt organizations (other than private foundations) are required to comply with requests made in person or in writing by individuals who seek a copy of the organization's Form 990 for any of the organization's three most recent taxable years.[167] Upon such a request, the organization is required to supply copies without charge other than a reasonable fee for reproduction and mailing costs. If the request for copies is made in person, then the organization

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[163] A court of appeals has held that the section 6104 disclosure requirements do not apply to documents relating to whether a tax-exempt organization is also a private foundation. *Breuhaus v. Internal Revenue Service*, 609 F.2d 80, 82 (2d Cir. 1979). Another court has held that disclosure of information relating to an investigation of a violation of section 501(c)(3) by an organization does not fall within the plain meaning of section 6104(a)(1) and, thus, is not subject to disclosure under section 6104. *Belisle v. Internal Revenue Service*, 462 F. Supp. 460 (W.D. Okla. 1978).

[164] Sec. 6104(d)(1)(A).

[165] Treas. reg. sec. 301.6104(d)-3(b)(3)(iii)(A).

[166] Sec. 6104(d)(2).

[167] Sec. 6104(d)(1)(B). This rule was added to the Code in 1996 by the Taxpayer Bill of Rights 2. It became effective on June 8, 1999, 60 days after the date the Treasury Department published regulations under the new provision.

must provide such copies immediately. If the request for copies is made in writing, then copies must be provided within 30 days. Tax-exempt organizations (other than private foundations) also must comply in the same manner with requests made in person or in writing by individuals who seek a copy of the organization's application for recognition of tax-exempt status and certain related documents. However, an organization may be relieved of its obligation to provide copies if (1) the organization has made the requested documents widely available by posting them on the Internet, or (2) the Secretary of the Treasury has determined, upon application by the organization, that the request is part of a harassment campaign and that compliance with such request is not in the public interest.[168]

Upon written request to the IRS, members of the general public also are permitted to inspect annual information returns of tax-exempt organizations and applications for recognition of tax-exempt status (and related documents) at the IRS National Office in Washington, D.C. or in the office of any district director.[169] A person making such a written request is notified by the IRS when the material is available for inspection at the IRS National Office, and where notes may be taken of the material open for inspection, photographs taken with the person's own equipment, or copies of such material obtained from the IRS for a fee.[170]

The Secretary may withhold disclosure of certain information described in an organization's application for tax-exempt status if disclosure would: (1) divulge a trade secret, patent, process, style of work, or apparatus of the organization, and the Secretary determines that such disclosure would harm the organization; or (2) harm the national defense.[171] The organization must apply to the Commissioner for a determination that the disclosure would

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[168] Sec. 6104(d)(4); Treas. reg. secs. 301.6104(d)-4(b)(2) and 301.6104(d)-5. Section 6104 was amended by the Tax and Trade Relief Extension Act of 1998 to extend to private foundations the same disclosure requirements that are now applicable to all other tax-exempt organizations. Pub. L. No. 105-277, sec. 1004 (1998). Under the new provision, private foundations will be required to comply with requests for copies of the foundation's annual information return for any of the foundation's three most recent taxable years and its application for tax exemption. Section 6104(d)(1). The provision extending the disclosure requirements to private foundations will be effective 60 days after the Treasury Department publishes final regulations in the Federal Register. Final regulations were published on January 13, 2000; thus, the new disclosure provisions will apply to private foundations whose annual information returns are due on or after March 13, 2000. *See* Treas. reg. secs. 301.6104(d)-1,-2,-3.

[169] Treas. reg. secs. 301.6104(a)-6 and 301.6104(b)-1.

[170] *Id.*

[171] Sec. 6104(a)(1)(D). In the case of a pension plan, information may be withheld if it would identify any particular individual covered under the plan. *Id.*

violate one of these criteria.[172] The organization will be given 15 days to contest an adverse determination before the information is made available for public inspection.[173]

Section 6104(a)(1)(A) provides that "any papers submitted in support of" an application for tax-exempt status must be available for inspection. By regulation, the Treasury Department has limited the definition of supporting documents to papers submitted by the organization.[174] The U.S. Court of Appeals for the District of Columbia Circuit upheld this regulation in *Lehrfeld v. Commissioner*,[175] on the ground that it harmonizes the meanings of two provisions within the general rule that applications for tax exemption are subject to public disclosure.

In *Lehrfeld*, an attorney submitted a request to the IRS for a copy of a particular organization's exemption application and all other documents available to the public under section 6104 and the FOIA. The attorney believed that prominent politicians might have written letters to the IRS to expedite the handling of the organization's application for tax exemption. The IRS released certain materials responsive to the attorney's request, but declined to release other documents on the ground that they fell outside the scope of section 6104 and therefore could not be disclosed under section 6103. According to the court, the documents the attorney sought were return information, and thus not subject to FOIA requests. Further, the court upheld the regulation on the ground that section 6104(a)(1)(A) was not intended to require disclosure of third-party documents.[176] The court found the plain meaning of section 6104(a)(1)(D) does not provide trade secret protection to third parties that submit documents in favor of another entity's tax-exempt status application. If the disclosure requirements applied to third-party documents, then information regarding trade secrets would not be submitted to the IRS by third parties in support of tax-exempt status applications. Therefore, the court held that the regulation is a valid interpretation of section 6104(a)(1)(A).[177]

Disclosure to State officials

With respect to section 501(c)(3) organizations, the IRS is required to notify the attorney general and the principal tax officer of the State in which the principal office of the organization is located and the State in which the organization was incorporated or created, of two types of final determinations: (1) the denial or revocation of tax-exempt status; or (2) a deficiency of tax

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[172] Treas. reg. sec. 301.6104(a)-5(a)(1).

[173] *Id.*

[174] Treas. reg. sec. 301.6104(a)-1(e).

[175] 132 F.3d 1463 (D.C. Cir. 1998).

[176] *Id.* at 1466.

[177] *Id.*

under section 507, or Chapter 41 or 42.[178] Other appropriate officers of any State may request that the IRS provide notification to them of such determinations, either generally or with respect to a particular organization or type of organization.[179] At the request of an appropriate State officer, the IRS must make available for inspection and copying such returns, filed statements, and other records relating to such determinations as are relevant to a determination under State law.[180]

Disclosure to Congressional committees

Any committee of the Congress may inspect exemption applications and any related papers held by the IRS.[181]

[178] Sec. 6104(c). Treas. reg. sec. 301.6104(c)-1(a). Section 507 imposes tax on certain organizations terminating their status as private foundations. Chapter 41 (secs. 4911 and 4912) imposes taxes on excess lobbying expenditures and disqualified lobbying expenditures by public charities. Chapter 42 (secs. 4940-4963) provides for taxes on private foundations for violations of restrictions on their operations, a tax on certain nonexempt trusts, taxes on certain foreign organizations, taxes on black lung benefit trusts, and taxes on political expenditures by section 501(c)(3) organizations.

[179] Treas. reg. sec. 301.6104(c)-1(a)(2).

[180] Sec 6104(c)(1)(C); Treas. reg. sec. 301.6104(c)-1(b)

[181] Sec. 6104(a)(2).

4. Section 6110: disclosure of written determinations

Section 6110 provides that the text of any written determination by the IRS and related background file document is open to public inspection.[182] The term "written determination"

[182] Sec. 6110(a).

means a ruling,[183] determination letter,[184] technical advice memorandum,[185] or Chief Counsel advice.[186] Closing agreements, which are final and conclusive written agreements entered into by the IRS and a taxpayer in order to settle the taxpayer's tax liability with respect to a taxable year, do not constitute written determinations.[187] A background file document includes the request for a written determination, any written material submitted by the taxpayer in support of the request,

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[183] A ruling is a written statement issued by the National Office to a taxpayer or his or her authorized representative. Treas. reg. sec. 301.6110-2(d). It generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts. Treas. reg. sec. 301.6110-2(d). In fiscal year 1999, the IRS issued 943 private letter rulings involving section 501(c) organizations; in fiscal year 1998, the IRS issued 1,059 private letter rulings involving section 501(c) organizations; and in fiscal year 1997, the IRS issued 975 private letter rulings involving section 501(c) organizations. IRS Exempt Organizations Division Inventory Control System.

[184] A district director issues a "determination letter" in response to a written inquiry from an individual or organization that applies principles and precedents previously announced by the IRS National Office to the particular facts involved. Treas. reg. sec. 301.6110-2(e).

[185] A "technical advice memorandum" is a written statement issued by the IRS National Office of the IRS to a district director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. Treas. reg. sec. 301.6110-2(f). Generally, a technical advice memorandum states the relevant facts, sets forth the applicable law, and states a legal conclusion. Treas. reg. sec. 301.6110-2(f). In fiscal year 1999, the IRS issued 22 technical advice memoranda involving section 501(c) organizations; in fiscal year 1998, the IRS issued 56 technical advice memoranda involving section 501(c) organizations; and in fiscal year 1997, the IRS issued 69 technical advice memoranda involving section 501(c) organizations. IRS Exempt Organizations Division Inventory Control System.

[186] Sec. 6110(b)(1). Any IRS National Office component of the Office of Chief Counsel can issue Chief Counsel advice. The IRS National Office component issues the advice to IRS field or service center employees, or to regional or district employees of Chief Counsel. Sec. 6110(i)(A)(i). The definition of Chief Counsel advice does not encompass advice issued from one IRS National Office component of the Office of Chief Counsel to another. The advice by definition conveys: (1) a legal interpretation of a revenue provision; (2) the IRS or Chief Counsel position or policy concerning a revenue provision; or (3) a legal interpretation of any law (Federal, State, or foreign) relating to the assessment or collection of liability under a revenue provision. Sec. 6110(i)(A)(ii).

[187] *See* S. Rep. No. 94-938, at 307 (1976). H.R. Rep. No. 94-658, at 316 (1976). In fiscal year 1999, the IRS finalized 78 closing agreements with section 501(c) organizations; in fiscal year 1998, the IRS finalized 72 closing agreements with section 501(c) organizations; and in fiscal year 1997, the IRS finalized 65 closing agreements with section 501(c) organizations. IRS Exempt Organizations Return Inventory and Classification System.

and any communications between the IRS and other persons in connection with the written determination received before issuance of the written determination.[188]

A background file document is available upon written request to any person requesting a copy of the related written determination.[189] Before releasing any written determination or background file document, the IRS must delete identifying details of the person about whom the written determination pertains and certain other information.[190] With respect to tax-exempt organizations, disclosure under section 6110 is limited to letters and rulings unrelated to an organization's tax-exempt status.[191]

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[188] Sec. 6110(b)(2). Communications between the IRS and the Department of Justice relating to a pending civil or criminal case are not considered background file documents.

[189] Sec. 6110(e).

[190] Sec. 6110(c) provides the following exemptions from disclosure:

> (1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1) (relating to third party contacts), identified in the written determination or any background file document;
>
> (2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;
>
> (3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and
>
> (7) geological and geophysical information and data, including maps, concerning wells.

[191] Sec. 6110(k)(1); Treas. reg. sec. 301.6110-1(a).

While section 6110 makes much IRS guidance public, its application to guidance relating to tax-exempt organizations is quite limited in comparison to guidance for taxable organizations. When section 6110 was enacted in 1976, Congress believed that section 6104 already permitted disclosure of guidance relating to tax-exempt organizations.[192] Thus, section 6110(k)(1) provides, "this section shall not apply to any matter to which section 6104 applies." The regulations under section 6110 clarify which matters are within the ambit of section 6104 and, therefore, are not subject to disclosure under section 6110:

> "[a]ny application filed with the Internal Revenue Service with respect to the qualification or exempt status of an organization . . .; any document issued by the Internal Revenue Service in which the qualification or exempt status of an organization is . . . granted, denied or revoked or the portion of any document in which technical advice with respect thereto is given to a district director; . . . the portion of any document issued by the Internal Revenue Service in which is discussed the effect on the qualification or exempt status of an organization of proposed transactions by such organization; and any document issued by the Internal Revenue Service in which is discussed the qualification or status of a [private foundation or private operating foundation].[193]

In addition, the regulations under section 6104 provide that some determination letters and other documents relating to tax exemption that are not open to public inspection under section 6104(a)(1)(A) are nevertheless "within the ambit" of section 6104 for purposes of the disclosure provisions of section 6110.[194] The regulation explains that the following documents are, therefore, not available for public inspection under either section 6104 or 6110:

(1) unfavorable rulings or determination letters issued in response to applications for tax exemption;
(2) rulings or determination letters revoking or modifying a favorable determination letter;
(3) technical advice memoranda relating to a disapproved application for tax exemption or the revocation or modification of a favorable determination letter;
(4) any letter or document filed with or issued by the IRS relating to whether a proposed or accomplished transaction is a prohibited transaction under section 503;
(5) any letter or document filed with or issued by the IRS relating to an organization's status as a private foundation or private operating foundation, unless the letter or document relates to the organization's application for tax exemption; and
(6) any other letter or document filed with or issued by the IRS which, although it relates

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[192] *See* S. Rep. No. 94-938, at 307.

[193] Treas. reg. sec. 301.6110-1(a).

[194] Treas. reg. sec. 301.6104(a)-1(i).

to an organization's tax exempt status as an organization described in section 501(c), does not relate to that organization's application for tax exemption.[195]

The effect of these limitations is that written determinations relating to exempt status issues are not released, even in redacted form. The IRS does, however, release written determinations issued to tax-exempt organizations that include issues that clearly are not within the ambit of section 6104, such as the application of the unrelated business income tax to a particular proposed transaction.

5. Penalties related to tax-exempt organization disclosure requirements

Penalties for failure to file timely or complete return

A penalty is imposed on a tax-exempt organization that either fails to file a Form 990 in a timely manner or fails to include all required information on a Form 990 of $20 for each day the failure continues (with a maximum penalty with respect to any one return of the lesser of $10,000 or five percent of the organization's gross receipts).[196] Organizations with annual gross receipts exceeding $1 million are subject to a penalty of $100 for each day the failure continues (with a maximum penalty with respect to any one return of $50,000). The IRS may make a written demand on an organization that has failed to file a timely or complete return specifying a date by which the return is to be filed or the information furnished. A penalty is imposed on any person failing to comply with the IRS demand equal to $10 for each day after the expiration of the time specified by the IRS during which the failure continues, subject to a maximum penalty of $5,000, with respect to any one return.[197] No penalty is imposed for failure to file in a timely manner or to include all required information if it is shown that the failure was due to reasonable cause.[198]

Penalties for failure to allow public inspection or provide copies

Penalties are imposed on tax-exempt organizations that fail to allow public inspection or provide copies of certain annual returns or applications for exemption at a level of $20 per day (with a maximum of $10,000 with respect to any one return).[199] No penalty is imposed with respect to a failure if it is shown that the failure was due to reasonable cause. In addition, there is

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[195] *Id.*

[196] Sec. 6652(c)(1)(A).

[197] Sec. 6652(c)(1)(B).

[198] Sec. 6652(c)(3).

[199] Secs. 6652(c)(1)(C) and 6652(c)(1)(D).

a penalty of $5,000 imposed for willful failure to allow public inspections or provide copies.[200]

6. Other Federal tax law disclosure rules applicable to tax-exempt organizations

Disclosure relating to deductibility of solicited funds

Fundraising solicitations, including solicitations for contributions, annual membership dues, or other payments, made by certain tax-exempt organizations must include a statement that payments to those organizations are not deductible as charitable contributions for Federal income tax purposes.[201] The requirement generally applies to organizations described in section 501(c) unless the organization is eligible to receive contributions that are deductible as charitable gifts under section 170(c) (e.g., section 501(c)(3) organizations), or is otherwise excepted from the requirement. Thus, section 501(c)(4) social clubs, section 501(c)(5) labor unions, section 501(c)(6) trade associations, section 501(c)(7) social clubs, section 501(c)(8) and section 501(c)(10) fraternal organizations, and certain other organizations must comply with the nondeductibility disclosure requirement.

Failure to include the required statement may result in a penalty imposed on the organization of $1,000 for each day on which the failure occurred, subject to a maximum penalty on failures by any organization during any calendar year of $10,000. However, the $10,000 maximum penalty does not apply if the failure is due to intentional disregard of the nondeductibility disclosure requirement. In such case, the penalty is $1,000 or 50 percent of the aggregate cost of the solicitations that occurred on such day and with respect to which there was a failure to disclose.

Disclosure relating to information or services that are available free from the government

Organizations described in section 501(c)(3), section 501(c)(4), or section 527(e) that sell information or routine services that could be readily obtained from an agency of the Federal government, either free or for a nominal fee, must include a statement when making an offer or solicitation that the information or service can be so obtained.[202] A penalty of the greater of $1,000 or 50 percent of the aggregate cost of the offers and solicitations that occurred on each day on which such failure to disclose occurred is imposed on the organization if the failure to make the required statement is due to intentional disregard of the disclosure requirement.

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[200] Sec. 6685.

[201] Sec. 6113.

[202] Sec. 6711(a).

B. Disclosure of Lobbying Expenses and Political Activities by Tax-Exempt Organizations

1. Disclosure of lobbying expenses

In general

Non-section 501(c)(3) organizations are required to provide annual information disclosure to members (sometimes referred to as "flow-through information disclosure") estimating the portion of such members' dues allocable to political campaign activities, as well as any lobbying activities. Such disclosure is not required for an organization that: (1) incurs only a *de minimis* amount (i.e., $2,000 or less) of in-house political campaign and lobbying expenditures during the taxable year; (2) elects to pay a 35-percent proxy tax on its political campaign and lobbying expenditures incurred during the taxable year rather than providing flow-through information disclosure to its members; or (3) establishes pursuant to Treasury Department rules that substantially all of its dues monies are paid by members not entitled to deduct such dues in computing their taxable income.

For Federal tax purposes, public charities are required to disclose their lobbying expenditures on Schedule A of Form 990, and to maintain records that will enable them to calculate and report these expenditures. Public charities electing the expenditure test report their expenditures on two charts. The first table requires the organization to list the amounts spent on grassroots lobbying, on direct lobbying, and on the organization's exempt purposes. The table requires this information both for the electing public charity and for its affiliated group, if the charity is part of one. The second table requires the organization to fill in its lobbying expenditures for the four most recent years in order to determine whether, on average, the organization has exceeded the lobbying expenditure limits during that period. Schedule A does not provide any information on the issues the organization lobbied nor does it require disclosure of whether the organization engaged in activities that come within one of the statutory exceptions to lobbying. Expenditures for activities that come within one of the exceptions to the definition of lobbying will be disclosed elsewhere on the return, although they are unlikely to be identified specifically by activity. For example, nonpartisan study, analysis, or research projects typically will be disclosed as part of a charity's educational activities in Part III of Form 990, which requires disclosure of program service expenses for each of the charity's exempt purpose accomplishments.

Nonelecting public charities complete a different table on Schedule A requesting information about whether the organization attempted to influence national, state or local legislation through the use of: volunteers; paid staff or management; media advertisements; mailings to members, legislators, or the public; publications, or published or broadcast statements; grants to other organizations for lobbying purposes; direct contact with legislators, their staffs, government officials, or a legislative body; or rallies, demonstrations, seminars, conventions, speeches, lectures, or any other means. If the organization used any of the above methods of lobbying, it must disclose the amount spent on the lobbying activity and provide a

detailed description of its lobbying activities. According to the instructions for Schedule A of Form 990, the detailed description should include all lobbying activities, whether expenses are incurred or not. Thus, lobbying activities carried out by unreimbursed volunteers must be disclosed. As is the case for electing public charities, there is no requirement that a nonelecting public charity disclose on Schedule A activities or amounts spent on activities that are defined as an exception to the definition of lobbying; however, expenditures for such activities will be disclosed elsewhere on the return, although they are unlikely to be identified specifically by activity.

Lobbying Disclosure Act of 1995

The Lobbying Disclosure Act of 1995 (the "LDA") requires persons, including tax-exempt organizations, that engage in certain lobbying activities to register with the Secretary of the Senate and the Clerk of the House of Representatives.[203] The LDA also requires persons that register to report lobbying expenditures semiannually. Organizations that register employees who lobby on the organization's behalf have the option of reporting their lobbying expenses under the LDA using either the LDA definitions of lobbying activities or the definitions under the applicable Internal Revenue Code provisions: section 4911 (the lobbying expenditure test, discussed above) and section 162(e) (denying a federal tax deduction for certain lobbying expenses of businesses and requiring tax-exempt associations to disclose the association's lobbying expenses to members).

A recent report by the GAO reviewed the impact that differences in the definitions (LDA, section 4911, and section 162(e)) have on registration and reporting under the LDA.[204] The report concluded that the LDA definition of lobbying differs significantly from the definitions of lobbying under sections 4911 and 162(e). These differences can affect whether an organization is required to register under the LDA and, if it must register, what information the organization is required to report under the LDA. The GAO identified several options, including harmonizing the different definitions of lobbying activities, that might help to ensure that the public disclosure purposes of the LDA are realized. Because analysis of the options proposed by the GAO would require substantial review of the various legislative purposes for enacting the LDA (which is not a Federal tax statute), section 4911, and section 162(e), as well as the different objectives underlying each provision's definition of lobbying activities, the Joint Committee staff determined that review of the GAO options for modifying the disclosure provisions of the LDA was not within the scope of this study.

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[203] Pub. L. No. 104-65 (1995).

[204] General Accounting Office, *Federal Lobbying: Differences in Lobbying Definitions and Their Impact* (GAO/GGD-99-38) (April 1999).

2. Disclosure of political activities

Section 501(c) organizations are required to disclose on their annual returns (Form 990) for each year the total amount of direct or indirect political expenditures made by the organization during the year. In addition, the annual return requires section 501(c) organizations to disclosure whether the organization filed a Form 1120-POL for the year, which is required if the organization's political expenditures and net investment income both exceed $100 for the year. If a non-section 501(c)(3) organization establishes and maintains a section 527(f)(3) separate segregated fund, the fund is required to file Form 1120-POL. The Form 1120-POL is not publicly disclosable under present law.

Section 527 political organizations are not required to apply for tax-exempt status and are not required to file Form 990. If the section 527 political organization has taxable income, it is required to file Form 1120-POL; similarly, if the political organization does not have taxable income, the Form 1120-POL is not required to be filed.

Because it is an income tax return, the Form 1120-POL requires information related to the amount of income and expenses of the filing organization (or separate segregated fund) for the year. Thus, the Form 1120-POL does not contain information relating to contributors to the organization or the specific activities of the organization (or fund).

Some section 527 political organizations are subject to disclosure requirements under the Federal Election Campaign Act of 1971 (see the discussion below); however, other such organizations are outside the reach of the disclosure requirements under the Federal elections laws.[205]

[205] *See* Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, Tax Notes, January 17, 2000, at 387.

IV. OVERVIEW OF DISCLOSURE REQUIRED UNDER FEDERAL ELECTION LAWS

The Federal Election Campaign Act of 1971 ("FECA") was enacted to regulate communications made in connection with Federal elections by imposing restrictions on eligible contributors, dollar contribution limits for individual contributors, and reporting and disclosure requirements. Among other things, FECA required full reporting of campaign contributions and expenditures. In the wake of documented campaign abuses in the 1972 presidential election, comprehensive amendments to FECA in 1974 resulted in the establishment of the Federal Election Commission (the "FEC"), an independent agency to assume the administrative functions under FECA and to serve as a clearinghouse for information on the administration of elections. In its ruling on a lawsuit filed by Senator James L. Buckley of New York and former Senator Eugene McCarthy to challenge the constitutionality of key provisions of the 1974 amendments to FECA, the Supreme Court ruled that some of the FECA expenditure limits and the method of appointing FEC commissioners were unconstitutional but upheld the FECA disclosure and recordkeeping requirements.[206]

In response to the Supreme Court's decision in *Buckley v. Valeo*, the Congress amended FECA in 1976 to repeal most of the expenditure limits and revise the provisions for the appointment of FEC Commissioners.[207] Additional amendments to FECA in 1979 simplified the reporting requirements.[208]

The courts have generally held that only communications that contain express words advocating the election or defeat of a political candidate (so-called "express advocacy") are subject to the requirements of FECA. Communications that fall outside of the FECA definition of "express advocacy" are commonly referred to as "issue advocacy." In many instances, communications by tax-exempt organizations and section 527 organizations may be subject to the FECA disclosure requirements. In other instances, such communications may not be "express advocacy" subject to the FECA reporting and disclosure requirements.

FECA requires each treasurer of a political committee to sign and file reports of receipts and disbursements. During any calendar year in which there is a regularly scheduled election or nomination for election, a political committee that is the principal campaign committee of a congressional candidate is required to file a pre-election report, a post-election report, and additional quarterly reports. In any other calendar year, a congressional candidate's committee is required to file semi-annual reports.[209] During any calendar year in which a general election is

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[206] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[207] Pub. L. No. 94-283.

[208] Pub. L. No. 96-187.

[209] 2 U.S.C.S. 434(a)(2).

held, the principal campaign committee of a presidential candidate generally is required to file monthly reports if the committee receives contributions aggregating $100,000 or more or makes expenditures aggregating $100,000 or more, or anticipates receiving such contributions or making such expenditures. If a presidential candidate's principal campaign committee is not required to file monthly reports due to the level of actual or anticipated contributions and expenditures, the committee generally must file the same pre-election, post-election, and quarterly reports required for congressional candidates. In a calendar year in which a general election is not held, a presidential candidate's committee is required to file either monthly reports or quarterly reports.[210] Political committees other than authorized committees of a congressional or presidential candidate are required to file either monthly reports or pre-election, post-election, and quarterly reports.[211]

The items that each report must disclose include the following:

(1) The total amount of all receipts and the total amount of all receipts in each of several categories, including contributions, transfers, and loans from committees, individuals, the candidate, and political party committees.

(2) The identification of contributors, transferors, and recipients of disbursements of more than $200.

(3) The total amount of all disbursements, and all disbursements in several categories, including expenditures made to meet candidate or committee operating expenses, transfers to other committees authorized by the same candidate, and loans and repayment of loans.

(4) The amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.[212]

In addition to reports by political committees, FECA requires every person other than a political committee who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year to file a statement that contains (1) the identity of the contributor, the date and the amount of all contributions received by such person, (2) the identity of the recipient of the independent expenditure, the date, amount, and purpose of the expenditure, and an indication of whether the independent expenditure is in support of, or in opposition to, the

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[210] 2 U.S.C.S. 434(a)(3).

[211] 2 U.S.C.S. 434(a)(4).

[212] 2 U.S.C.S. 434(b).

candidate involved, (3) a certification whether or not such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate, and (4) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure. Any independent expenditure aggregating $1,000 or more made after the 20th day, but more than 24 hours before any election must be reported within 24 hours after such independent expenditure is made. The statement concerning such an expenditure must contain the identity of the recipient of the independent expenditure, the date, amount, and purpose of the expenditure, and an indication of whether the independent expenditure is in support of, or in opposition to, the candidate involved. FECA requires the FEC to prepare indices that set forth, on a candidate-by-candidate basis, all independent expenditures separately made by or for each candidate and to periodically publishing such indices on a timely pre-election basis.[213]

Since 1979, the FECA amendments and election reform measures adopted by the Congress have been limited in scope. The most significant developments in election reform have been judicial and administrative, especially as a result of FEC attempts to implement and enforce the applicable laws. As the agency responsible for administration and enforcement of FECA, the FEC provides disclosure of the campaign finance information it gathers pursuant to the FECA reporting and recordkeeping requirements. In a report commemorating its 20th anniversary, the FEC provided the following description of its disclosure responsibility:

> Disclosing the sources and amounts of funds used to finance Federal elections is perhaps the most important of the FEC's duties. In fact, it would be virtually impossible for the Commission to effectively fulfill any of its other responsibilities without disclosure. The Commission could not, for example, enforce the law without knowledge of each committee's receipts and disbursements. Disclosure also helps citizens evaluate the candidates running for Federal office and it enables them, along with the agency, to monitor committee compliance with the election law. Given these facts, the Commission has devoted substantial resources to providing effective access to campaign finance data.[214]

Since it was established in 1974, the FEC has disclosed campaign finance data and provided information on the election law to both the general public and regulated committees and persons in order to create an educated electorate and promote compliance with the campaign finance law. Both the FEC's public disclosure program and educational outreach efforts promote compliance by facilitating public scrutiny of campaign finance records and by fostering

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[213] 2 U.S.C.S. 434(c).

[214] Federal Election Commission, Twenty Year Report 4 (1995).

understanding of the law.[215]

When a committee files its report with the FEC, the Public Records Office ensures that a copy is available for public inspection within 48 hours. Simultaneously, the FEC's data staff begins to enter the information disclosed in the report into the FEC computer database. The amount of information disclosed has grown dramatically over the years. By December 1994, more than 12 million pages of information were available for public review. In the Public Records Office, citizens may inspect microfilm and paper copies of committee reports, as well as the FEC's computer database and more than 25 different computer indexes that make the data more accessible. For example, the "G Index" lists individuals who have given more than $200 to a committee during an election cycle. The "K Index" and the "L Index" offer broader "bank statement" views of receipts and disbursements for PACs, parties and candidates.[216]

In recent years, computers have enhanced the disclosure process. FEC currently uses computer technology in virtually every aspect of the disclosure process, from electronic filing to distributing information over the Internet. In January 1997, the FEC established the first phase of an interim electronic filing program that allowed committees to file reports via computer disk. In 1998, the FEC launched the second phase of the program, permitting filers to submit reports to the FEC by modem and via the Internet.[217]

The FEC creates digital images of all reports filed with the FEC by scanning the documents. The public may view these digital images in the FEC's Public Records Office or on the FEC's Internet web site. In addition to the digital imaging system, the FEC codes and enters information from campaign finance reports into the FEC's disclosure database, which contains data from 1977 to the present. Information is coded so that committees are identified consistently throughout the database.[218]

In recent years, the FEC has significantly enhanced the availability of campaign finance data through its web site. One enhancement is a new query system that allows visitors to access the name and contribution amount of any individual who contributed $200 or more to a Federal political committee during the 1997-1998 election cycle. In addition, the query system allows users to access lists of PACs or party committees that contributed to specific candidates and to view lists of candidates to whom selected PACs and parties contributed. The system, which is updated daily, also allows users to access digitized copies of the actual reports filed by House candidates, PACs and party committees. The Public Records Office continues to make available microfilmed copies of all campaign finance reports, paper copies of reports from Congressional

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[215] Federal Election Commission, Annual Report 1998, p. 7.

[216] Federal Election Commission, Twenty Year Report 4 (1995).

[217] Federal Election Commission, Annual Report 1998, p. 7.

[218] *Id*.

candidates and FEC documents such as press releases, audit reports, closed enforcement cases and agenda documents. The FEC also continues to offer on-line computer access to the disclosure database to more than 1,000 subscribers to the thirteen-year-old Direct Access Program for a small fee. Subscribers include journalists, political scientists, campaign workers and other interested citizens.[219]

[219] *Id.*

V. DATA RELATING TO TAX-EXEMPT ORGANIZATIONS

A. Tax-Exempt Organization Data

As of October 31, 1999, there were over 1.3 million organizations exempt from taxation under section 501(a) and described in section 501(c) that had received recognition of their tax-exempt status from the IRS.[220] Somewhat more than half of those organizations, or 776,557, are charitable, educational, religious, and other organizations described in section 501(c)(3).[221] Of the organizations described in section 501(c)(3) as of October 31, 1999, approximately 90 percent are public charities.[222]

Between 1996 and 1999, the total number of organizations described in section 501(c) rose by between 40,900 and 44,000 annually.[223] The number of organizations described in section 501(c)(3) also grew steadily during the same period by roughly 40,000 per year.[224] Table 1, below, shows a breakdown of the number of organizations described in each subparagraph of section 501(c), as of October 31, 1999:

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[220] The source of this data is the IRS Exempt Organizations/Business Master File, Table 3. The data regarding tax-exempt organizations provided in this section and elsewhere in this volume of the study were assembled by the IRS for a variety of purposes. Different data were subject to different levels of quality review by the IRS; consequently, the accuracy of the numbers provided may vary. Unless otherwise noted, the data provided includes only those organizations that have received recognition of their tax-exempt status from the IRS. Thus, the data does not include organizations, such as churches, that are not required to seek recognition of tax-exempt status from the IRS.

[221] *Ibid.*

[222] *Ibid.*

[223] *Ibid.*

[224] *Ibid.*

Table 1.--Number of Tax-exempt Organizations by Category

Category of Organization	Number of Organizations
Instrumentalities of the United States (sec. 501(c)(1))	19
Title and real property holding companies (sec. 501(c)(2))	7,032
Charitable organizations (sec. 501(c)(3))	776,557
Social welfare organizations (sec. 501(c)(4))	138,998
Labor, agricultural, or horticultural organizations (sec. 501(c)(5))	63,708
Trade associations (sec. 501(c)(6))	81,489
Social clubs (sec. 501(c)(7))	67,001
Fraternal benefit societies (sec. 501(c)(8))	84,051
Voluntary employees' beneficiary associations (sec. 501(c)(9))	13,848
Domestic fraternal organizations (sec. 501(c)(10))	23,227
Teachers' retirement fund associations (sec. 501(c)(11))	14
Benevolent life insurance associations, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations (sec. 501(c)(12))	6,461
Cemetery companies (sec. 501(c)(13))	9,978
Nonprofit credit unions (sec. 501(c)(14))	4,402
Certain insurance companies or associations (sec. 501(c)(15))	1,298
Crop-financing corporations (501(c)(16))	23
Supplemental unemployment compensation trusts (sec. 501(c)(17))	515
Employee-funded pension trusts (sec. 501(c)(18))	2
U.S. armed forces posts or organizations (sec. 501(c)(19))	35,499
Black lung trusts (sec. 501(c)(21))	28
Multiemployer plan trusts (sec. 501(c)(22))	0
Armed forces insurance associations (sec. 501(c)(23))	2
Trusts described in ERISA section 4049 (sec. 501(c)(24))	1

Category of Organization	Number of Organizations
Title-holding corporations or trusts (sec. 501(c)(25))	1,102
State-sponsored high-risk health insurance pools (sec. 501(c)(26))	8
State-sponsored workers' compensation organizations (sec. 501(c)(27))	5

Source: IRS Exempt Organizations/Business Master File Table 3

B. Annual Filing Requirements for Tax-Exempt Organizations

Tax-exempt organizations generally are required to file an annual information return with the IRS.[225] An organization that has not received a determination of its tax-exempt status, but that claims tax-exempt status under section 501(a), is subject to the same annual reporting requirements and exceptions as organizations that have received a tax-exemption determination.

Most tax-exempt organizations are required to file annually Form 990 (Return of Organization Exempt From Income Tax). Section 501(c)(3) organizations that are classified as public charities must file Form 990 and an additional form, Schedule A, which requests information specific to section 501(c)(3) organizations. An organization that is required to file Form 990, but that has gross receipts of less than $100,000 during its taxable year, and total assets of less than $250,000 at the end of its taxable year, may file Form 990-EZ instead of Form 990.

On the applicable annual information return, organizations are required to report their gross income, information on their finances, functional expenses, compensation, activities, and other information required by the IRS in order to review the organization's activities and operations during the previous taxable year and to review whether the organization continues to

[225] For a detailed discussion of filing requirements for tax-exempt organizations, see Joint Committee on Taxation, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Volume II: Study of Disclosure Provisions Relating to Tax-Exempt Organizations* (JCS-1-00), January 28, 2000.

The requirement of filing an annual information return does not apply to several categories of tax-exempt organizations. Organizations excepted from the filing requirement include: churches, their integrated auxiliaries, and conventions or associations of churches; certain organizations (other than private foundations), the gross receipts of which in each taxable year are normally not more than $25,000; the exclusively religious activities of any religious order; section 501(c)(1) instrumentalities of the United States; section 501(c)(24) trusts described in ERISA section 4049; an interchurch organization of local units of a church; certain mission societies; and certain church-affiliated elementary and high schools.

meet the statutory requirements for exemption. Form 990 also requires disclosure of certain activities including the following:

(a) Political expenditures: Line 81a of Form 990 requires the disclosure of the amount of expenditures, direct or indirect, intended to influence the selection, election, or appointment of anyone to political office.

(b) Lobbying activities: Schedule A, Part III and Parts VI-A and VI-B requires public charities to quantify their attempts to influence national, state, or local legislation.[226]

An organization described in section 501(c) or section 527 must file Form 1120-POL for any year in which it has net investment income and expends any amount to influence the selection, nomination, election or appointment of any individual to office, for which the combined total expenditure for the taxable year is $100 or greater.

Table 2, below, provides the number of Forms 990, Forms 990-EZ, and Forms 1120-POL filed in calendar years 1996, 1997, 1998.

Table 2.--Returns Filed for Tax-Exempt Organizations

Returns Filed	**1998**	**1997**	**1996**
Form 990	287,627	320,130[227]	281,864
Form 990-EZ	124,076	124,551	118,271
Form 1120-POL	5,649	6,006	4,363

Source: IRS Statistics of Income samples of joint returns posted for tax periods December 1996 - November 1997, December 1995 - November 1996, and December 1994 - November 1995.

[226] Public charities that make the section 501(h) lobbying election and that incur tax for excess lobbying expenditures must also file Form 4720.

[227] The IRS speculates that the increase in Forms 990 recorded as filed in 1997 may have resulted from the centralization of Form 990 processing at the IRS Service Center in Ogden, Ohio.

Table 3, below, reports the number of 501(c)(3) organizations that reported political expenditures on Form 990 in 1994 and 1995 and the aggregate expenditure of all organizations that reported.

Table 3. - Political Expenditures and Expenses Incurred to Influence National, State, or Local Legislation Reported by 501(c)(3) Tax-Exempt Organizations on Form 990, 1994 and 1995

	1994		1995	
	Number of Returns	**Aggregate Dollar Expenditures Reported on All Returns**	**Number of Returns**	**Aggregate Dollar Expenditures Reported on All Returns**
Political Expenditures (Line 81a of Form 990)	309	$4,498,540	470	$3,498,996
Expenses Incurred to Influence National, State, or Local Legislation (Part III, line 1, Schedule A)	2,658	$247,765,988	2,380	$91,246,395

source: Internal Revenue Service, Statistics of Income Division and Joint Committee on Taxation staff calculations.

Table 4, below, reports the political expenditures reported on Form 990 for organizations that are tax exempt under Code sections 501(c)(4), 501(c)(5), 501(c)(6), 501(c)(7), 501(c)(8), and 501(c)(9). In addition, Table 4 reports the number of such organizations that reported filing a Form 1120-POL.

Table 4. - Reported Political Expenditures of 501(c)(4)-501(c)(9) Tax-Exempt Organizations Reported on Form 990, 1994 and 1995

	1994		1995	
	Number of Returns	**Aggregate Dollar Expenditures Reported on All Returns**	**Number of Returns**	**Aggregate Dollar Expenditures Reported on All Returns**
Political Expenditures (Line 81a of Form 990)	1,274	$20,069,432	1,280	$19,025,702
Filed Form 1120-POL	811	$17,832,559	970	$9,750,707

source: Internal Revenue Service, Statistics of Income Division and Joint Committee on Taxation staff calculations.

The IRS conducts examinations annually of selected returns filed by tax-exempt organizations. Table 5, below, provides the number of tax-exempt organization return examinations of Form 990, Form 990-EZ, and Form 1120-POL completed in fiscal years 1997 through 1999.

Table 5.--Number of Form 990, 990-EZ, and 1120-POL Return Examinations Closed

Form	**FY 1999**	**FY 1998**	**FY 1997**
Forms 990, 990-EZ (All Other Tax-Exempt Organizations)	4,170	4,145	4,166
Form 1120-POL	75	107	30

Source: IRS Audit Information Management System, Tables 20.1 and 20.3.

VI. DESCRIPTION OF CERTAIN PROPOSALS TO INCREASE DISCLOSURE OF POLITICAL ACTIVITIES BY TAX-EXEMPT ORGANIZATIONS

A. H.R. 4168 (the "Underground Campaign Disclosure Act of 2000"), Introduced by Mr. Doggett and Others

In general

H.R. 4168 would increase the reporting and disclosure of information by political organizations (as defined in section 527(e), but without regard to whether an organization claims the specific tax treatment contained in section 527.) An organization that engages in activities defined in section 527(e) is treated as a political organization subject to reporting and disclosure requirements even if the organization does not file a Form 1120-POL.

Statement of organization

Under the bill, a political organization would be required to file a statement of organization with the Secretary of the Treasury no later than 10 days after the date the organization is established (or, if earlier, 10 days after the date of enactment).

The statement of organization would be required to include the following information:

(1) the name and address of the organization;
(2) the name, address, relationship, and type of any person directly or indirectly related to or affiliated with the organization;
(3) the name, address, and position of the custodian of books and accounts of the organization;
(4) the name and address of the treasurer of the organization; and
(5) a listing of all banks, safety deposit boxes, and other depositories used by the organization.

In addition, under the bill, if the information contained in the statement of organization ceases to be accurate, the organization is required to file a corrected statement with the Secretary of the Treasury no later than 10 days after the information ceases to be accurate.

For purposes of the statement of organization, a person is considered directly or indirectly related to or affiliated with a political organization if, at any time during the 3-year period ending on the date of the statement, the person was in a position to exercise substantial direct or indirect influence over the process of collecting or disbursing the exempt purpose funds of the organization or was in a position to exercise substantial, overall direct or indirect influence over the activities of the organization.

Under the bill, the present-law public inspection requirements of section 6104 would be extended to the statement of organization required to be filed for political organizations. Thus, a copy of the statement of organization would be required to be made available by the organization for inspection during regular business hours at the principal office of the organization and, if the organization maintains at least one regional or district office with 3 or more employees, at each such regional or district office. In addition, an individual would be permitted to request a copy of such statement of organization.

The penalty for failure to file properly the required statement of organization would be $100 for each day during which such failure continues, up to a maximum of $50,000 on failures with respect to one statement of organization. In addition, the bill would permit the Secretary of Treasury to make a written demand of a political organization of a reasonable future date by which a statement of organization will be filed. Any person who fails to comply with such a written demand would be subject to a penalty of $10 per day for each day after the expiration of the time specified in the demand for filing, up to a maximum penalty with respect to such statement of $5,000.

The penalty for failure to satisfy the public inspection requirements with respect to a statement of organization would be $20 for each day during which such failure continues up to a maximum of $10,000 with respect to each failure.

Statement of contributions and disbursements

The bill would require a political organization to file a statement of contributions and disbursements with the Secretary of the Treasury for each reporting period.

Under the bill, the reporting periods and deadlines generally would be the same as those required for reports under the Federal Election Campaign Act of 1971 ("FECA").[228] In general, the FECA specifies different reporting periods and deadlines depending upon whether it is an election or non-election year and the nature of the organization (i.e., principal campaign committee of a candidate for the House of Representatives or Senate, principal campaign committee of a candidate for the office of President, or a political committee other than an authorized committee of a candidate). Under the FECA, reporting can be required monthly, quarterly, or semi-annually and special pre- and post-general election reports are required. Under the bill, in the case of a political organization organized and operated exclusively for the purpose of securing the nomination, election, or appointment of a candidate for State, local, or judicial office, the reporting period would be the organization's taxable year and the deadline for reporting would be the due date for the organization's annual return, whether or not the organization is required to file an annual return.

Under the bill, the statement of contributions and disbursements would be required to

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[228] 2 U.S.C. 434(a).

include the following information:

(1) the name and address of each person to whom the organization made any disbursement during the reporting period in excess of $200 within the calendar year;
(2) a certification, under penalty of perjury, whether the disbursement is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate for public office or any authorized committee of such a candidate;
(3) the name, address, occupation, and employer name of each person who made a contribution in excess of $200 to the organization during the reporting period;
(4) the name, address, and business purpose of any entity that made a contribution in excess of $200 to the organization during the reporting period;
(5) in the case of an entity described in (4), whether the entity claims to be exempt from tax and the basis for the tax-exempt status; and
(6) the original source and the intended ultimate recipient of all contributions made by a person directly or indirectly, including contributions that are earmarked or otherwise directed through an intermediary.

Modification of Federal gift tax provisions

The bill provides that the present-law exclusion from the Federal gift tax for transfers to political organizations described in section 527 would not apply to a political organization that fails to satisfy the reporting and disclosure requirements under the bill.

Effective date

The bill would be effective on the date of enactment.

B. H.R. 3688 (the "Campaign Integrity Act of 2000"), Introduced by Mr. Moore and Others

In general

H.R. 3688 would amend the definition of a political organization in section 527(e) of the Code to require that such an organization file an annual statement with the Secretary of the Treasury certifying that the organization is in compliance with reporting requirements under the FECA, as amended by the bill. The annual statement would be required to be filed no later than the due date for the annual return for the organization, whether or not the organization is required to file an annual return for such year.

Under the bill, the annual statement would not be required by the following organizations:

> (1) any organization that exists for the exclusive purpose of influencing or attempting to influence (a) the selection, nomination, or appointment of any individual to State or local public office or office in a State or local political organization, (b) the appointment of any individual to any Federal public office, or (c) the selection, nomination, election, or appointment of any individual to any office in a political organization;
> (2) any committee, club, association, or other group of persons (other than a separate segregated fund established under the FECA) that accepts contributions or makes expenditures during a calendar year in an aggregate amount of less than $5,000; and
> (3) any political committee described in section 301(4) of the FECA (generally, any committee, etc., that accepts contributions or makes expenditures of less than $1,000 in the aggregate for the calendar year, any separate segregated fund established under the FECA, or any local committee of a political party that accepts contributions or makes expenditures during a calendar year of less than $5,000).

However, under the bill, an organization cannot fall into the exception described in (1), above, if a payment is made during an election cycle for any communication that mentions a clearly identified candidate for election for Federal office or that contains the likeness of such a candidate, other than certain news stories, commentaries, and editorials and certain payments made or obligations incurred by a corporation or labor organization that would not constitute an expenditure by such corporation or labor organization under the FECA.

Reporting requirements under FECA

Under the bill, a section 527 organization satisfies the reporting requirements under the FECA if the organization files a statement of organization with the Federal Election Commission no later than 10 days after the organization first receives or spends an aggregate amount of at least $5,000 during the year for an exempt function as defined in section 527. In addition, the organization would be required to file with the Federal Election Commission a report of receipts and disbursements at the same time and in the same manner as a political committee is required

to file under the FECA.

The statement of organization would be required to contain the following information:

(1) the name, address, and type of organization;
(2) the name, address, relationship, and type of connected or affiliated organization;
(3) the name, address, and position of the custodian of books and accounts of the organization;
(4) the name, address, and position of the president, chief executive officer, or similar authority of the organization.

The report of receipts and disbursements would be required to contain the following information:

(1) the amount of cash on hand at the beginning of the reporting period;
(2) for the reporting period and the calendar year, the total amount of all receipts, and the total amount of receipts in the following categories:
    (a) receipts from persons other than political committees,
    (b) receipts from political party committees,
    (c) receipts from other political committees,
    (d) all loans (other than loans made by or guaranteed by a candidate), and
    (e) dividends, interest, and other forms of receipts;
(3) the identification of the following:
    (a) each person (other than a political committee) who makes disbursements to the organization in excess of $200 within the calendar year and the date of disbursements made,
    (b) each political committee that makes a disbursement to the organization during the reporting period, with the date and amount of each such disbursement,
    (c) each person who makes a loan to the organization during the reporting period, including any endorser or guarantor and the date and amount or value of the loan,
    (d) each person who provides a rebate, refund, or other offset to an organization's operating expenditures in excess of $200 for the calendar year, with the date and amount of the receipt,
    (e) each person who provides any dividend, interest, or other receipt to the organization in excess of $200 for the calendar year, with the date and amount of the receipt;
(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
    (a) disbursements to persons other than political committees,
    (b) disbursements to political party committees,
    (c) disbursements to other political committees,
    (d) the repayment of all loans (other than loans made by or guaranteed by a candidate), and
    (e) any other disbursements; and

(5) the name and address of each

(a) person to whom disbursements in excess of $200 for the calendar year are made to meet a candidate or organization operating expenses, with the date, amount, and purpose of the expenditure,

(b) person who receives a loan repayment during the reporting period, with the date and amount of the repayment, and

(c) person who receives a refund or offset to receipts from the organization, together with the date and amount of such disbursement.

Effective date

The bill would be effective on the date of enactment.