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501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws

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Summary

The campaign activities of tax-exempt 501(c)(4) social welfare organizations continue to receive considerable attention. These groups operate with less restriction after the Supreme Court's decision in *Citizens United v. FEC,* which invalidated long-standing prohibitions in the Federal Election Campaign Act (FECA) on corporations and labor unions using their general treasury funds to make independent expenditures and electioneering communications. However, even after *Citizens United*, 501(c)(4) groups are still subject to regulation under FECA and the Internal Revenue Code (IRC).

Under FECA, incorporated groups are prohibited from making political contributions and are still required to establish a political action committee (PAC) in order to do so. (In contrast to independent expenditures and electioneering communications, contributions are given to a candidate or political committee). Additionally, the claim is sometimes made that 501(c)(4) groups should be required to register as political committees under FECA. This is important because political committees must raise and spend funds subject to FECA contribution limits, source restrictions, and disclosure requirements.

Under the IRC, a Treasury regulation requires that 501(c)(4) organizations have the promotion of social welfare as their primary purpose. This means two things: (1) campaign activity (along with any other non-exempt purpose activity) cannot be the organization's primary activity and (2) a group that primarily benefits private partisan interests may jeopardize its 501(c)(4) status. Questions abound about these two restrictions and how they are applied (e.g., how is campaign activity measured?), and the IRS has been criticized for failing to issue guidance in this area.

501(c)(4) organizations are required to report information to the IRS and FEC. They are generally required to file an annual information return (Form 990) with the IRS. Information about campaign activity is reported on the form's Schedule C, which is subject to public disclosure. While large donors are reported on the form, no identifying information is required to be publicly disclosed. Additionally, groups making independent expenditures and electioneering communications must file reports with the FEC. Only those donors giving more than $200 specifically "for the purpose of furthering" an independent expenditure are disclosed. For electioneering communications, FECA requires the disclosure of donors who contributed at least $1,000; however, if the group establishes a separate bank account, consisting only of donations from U.S. citizens and legal resident aliens made directly to the account, then only those donors who contributed at least $1,000 to the account are disclosed. A Federal Election Commission (FEC) regulation provides an exception to the donor disclosure requirement for electioneering communications. The regulation permits corporations—including incorporated 501(c)(4) groups—and labor unions making disbursements for electioneering communications to disclose only the identity of each person who made a donation of at least $1,000 specifically "for the purpose of furthering" an electioneering communication. This regulation has been the topic of ongoing litigation, *Center for Individual Freedom v. Van Hollen*, which is currently pending in the U.S. District Court for the District of Columbia.

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The tax-exempt social welfare organizations described in Section 501(c)(4) of the Internal Revenue Code (IRC)[1] must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community."[2] They are permitted to engage in campaign activity under federal law, but must comply with both the IRC and the Federal Election Campaign Act (FECA).[3]

The campaign activities of 501(c)(4) groups continue to receive significant scrutiny. These groups are among the entities operating with less restriction due to the Supreme Court's ruling in *Citizens United v. FEC*.[4] In that case, the Court invalidated the prohibitions in FECA on corporations using their general treasury funds to make independent expenditures and electioneering communications. An "independent expenditure" is spending for a communication that expressly advocates the election or defeat of a clearly identified candidate, and is not made in cooperation with or at the request or suggestion of such candidate or a political party.[5] An "electioneering communication" is a broadcast, cable, or satellite communication that refers to a clearly identified federal candidate, is made within 30 days of a primary or 60 days of a general election, and for House and Senate races, is targeted to the relevant electorate.[6]

These FECA prohibitions had affected 501(c)(4) groups in two ways. First, many are incorporated, and thus were prohibited from using their general treasury funds for independent expenditures and electioneering communications unless they qualified for a limited exception.[7] Additionally, prior to *Citizens United*, no 501(c)(4) organizations—regardless of corporate status—could serve as conduits for corporate or labor union treasury funds to fund independent expenditures and electioneering communications.

While 501(c)(4) organizations are operating with less restriction under FECA after *Citizens United*, there still remain important restrictions and requirements on these groups to engage in campaign activity under both FECA and the IRC. That is, FECA prohibits corporations from using their treasury funds to make contributions to candidates and parties, requiring them to establish a Political Action Committee (PAC) in order to do so; the IRC sets forth certain requirements related to maintaining tax-exempt status; and FECA requires a group whose major purpose is to elect federal candidates to register as a political committee, which means that it must raise and spend campaign funds subject to FECA's contribution limits, source restrictions,

[1] I.R.C. §501(c)(4) describes, among other entities, "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare" with "no part of the net earnings of such entity inure[ing] to the benefit of any private shareholder or individual."

[2] Treas. Reg. §1.501(c)(4)-1(a)(2).

[3] 2 U.S.C. §431 *et seq*.

[4] 130 S. Ct. 876 (2010); *see also* CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker.

[5] 2 U.S.C. §431(17); 11 C.F.R. §100.16(a).

[6] 2 U.S.C. §434(f)(3). FECA provides that a communication referring to a clearly identified federal candidate is "targeted to the relevant electorate" if it can be received by at least 50,000 persons within the House district that the candidate seeks to represent or in the case of a Senate election, within the state. 2 U.S.C. §434(f)(3)(C). FECA generally exempts from the definition of "electioneering communication" news stories and editorials; communications meeting the definition of "independent expenditure," discussed *infra*; and candidate debates and forums. 2 U.S.C. §434(f)(3)(B).

[7] *See* 11 C.F.R. §114.10(c); *FEC v. Massachusetts Citizens for Life, Inc., (MCFL)*, 479 U.S. 238 (1986). For further discussion of *MCFL*, see CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

and disclosure requirements. Additionally, 501(c)(4) groups are subject to IRC and FECA reporting requirements. All are discussed below.

Prohibition on Corporate Campaign Contributions

As a threshold matter, it is important to note that while the Supreme Court's decision in *Citizens United* invalidated the federal ban on corporate treasury funding of independent expenditures and electioneering communications, it did not appear to affect the ban on corporate *contributions* to political candidates and parties.[8] FECA defines a contribution to include "anything of value" that is given, made available, or rendered to a candidate or political committee.[9] In contrast, an independent expenditure is defined to include "anything of value" that is spent expressly to advocate the election or defeat of a clearly identified candidate and is not made in concert or cooperation with or at the request or suggestion of a candidate or a political party.[10] In an exception to the prohibition, corporations are permitted to use their treasury funds to establish, administer, and solicit contributions to a separate segregated fund—also known as a PAC—and may use such PAC funds for contributions.[11]

As a result, 501(c)(4) organizations that are incorporated are still prohibited from using their treasury funds to make contributions to candidates and parties, and would still be required to establish a PAC in order to do so. In addition, no 501(c)(4) organization—regardless of corporate status—can serve as a conduit for corporate or labor union treasury funds to make such contributions.

Requirements to Maintain 501(c)(4) Status

501(c)(4) organizations must comply with requirements in the IRC in order to maintain their tax-exempt status.[12] For those groups choosing to engage in campaign activity, two restrictions stand out. First, under a Treasury regulation, campaign activity (along with any other non-exempt purpose activity) cannot be the organization's primary activity. Second, the IRS has ruled that a group which primarily benefits partisan interests could jeopardize its 501(c)(4) status.

Primary Activity Cannot be Campaign Activity

First, campaign activity (along with any other non-exempt purpose activity) cannot be a 501(c)(4) organization's primary activity.[13] While no statute expressly addresses the ability of 501(c)(4)

[8] 2 U.S.C. §441b(a).

[9] 2 U.S.C. §431(8).

[10] 2 U.S.C. §431(17).

[11] *See* 2 U.S.C. §441(b)(B)(2)(C).

[12] A group may file an application with the IRS for 501(c)(4) status using the Form 1024, although there is no statutory requirement to do so. On May 14, 2013, the Treasury Inspector General for Tax Administration (TIGTA) released a report alleging, among other things, that the IRS used inappropriate criteria in determining whether certain politically active groups qualified for 501(c)(4) status. *See* Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, 2013-10-053 (May 14, 2013), http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf. On May 17, 2013, the House Ways and Means Committee held a hearing on this issue, with additional committees moving to examine the issue as well. For information on the Ways and Means hearing, see http://waysandmeans.house.gov/calendar/eventsingle.aspx?EventID=333643.

[13] This same standard applies to some other types of tax-exempt organizations, including 501(c)(5) labor unions and

groups to engage in campaign activity,[14] this limitation is implicit in the statutory requirement in Section 501(c)(4) that organizations be "operated exclusively for the promotion of social welfare." This language raises two questions: (1) what does "exclusively" mean; and (2) is campaign activity part of a "social welfare purpose."

A Treasury regulation answers both questions and, as such, is the source of the standard. First, the regulation states that a group is "operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[15] Second, it clarifies that engaging in campaign activity does not count as promoting social welfare.[16] Putting these two concepts together creates the standard: since the primary purpose of these 501(c)(4) organizations must be promoting social welfare, campaign activity (and any other non-exempt purpose activities) cannot be their primary activity.[17]

Some might take issue with the regulation interpreting "exclusively" to mean "primarily." If the interpretation were challenged in court,[18] a court would likely begin by examining the plain meaning of the statutory language at issue.[19] When courts are faced with interpreting a statutory term, they generally begin by looking at whether the term is defined in the statute or elsewhere in the U.S. Code, such as the Dictionary Act.[20] If there is no definition, courts then typically look to see if the term has an accepted meaning in law (i.e., is a "term of art").[21] Words and phrases that are not terms of art or defined by statute are customarily given their ordinary meanings, often derived from the dictionary.[22]

Here, the term "exclusively" is not defined in statute, whether in the IRC or somewhere else. This may lead some to think the term should be given its ordinary and customary definition. The dictionary definition of "exclusively" is "only" or "solely,"[23] which suggests the IRS interpretation is overly broad.

However, this is an example of where a term's statutory meaning might not be obvious on its face. In a 1945 case, the Supreme Court found that a Social Security Act requirement that an

501(c)(6) trade associations.

[14] By comparison I.R.C. §501(c)(3) provides that charitable organizations may "not participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office." For more information, see CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*.

[15] Treas. Reg. §1.501(c)(4)-1(a)(2)(i).

[16] *See* Treas. Reg. §1.501(c)(4)-1(a)(2)(ii) ("The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.").

[17] *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that lawful participation in campaign activity would not affect the 501(c)(4) status of an organization whose primary activity was promoting social welfare); Rev. Rul. 67-368; 1967-2 C.B. 194 (ruling that an organization whose primary activity was rating candidates using non-partisan criteria did not qualify for 501(c)(4) status).

[18] It is not clear whether any party other than an organization whose tax-exempt status was denied or revoked would have standing to bring suit. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); United States Catholic Conference v. Baker, 885 F.2d 1020 (2nd Cir. 1989).

[19] *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (discussing the often-recited "plain meaning rule," under which if the language of the statute is clear, there is no need to look to its legislative history in order to ascertain its meaning); Williams v. Taylor, 529 U.S. 420, 431 (2000)("We start, as always, with the language of the statute.").

[20] *See, e.g.,* Colautti v. Franklin, 439 U.S. 379, 392 (1979).

[21] *See, e.g.,* Sullivan v. Stroop, 496 U.S. 478, 483 (1990); Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944); Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989).

[22] *See* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995).

[23] *See, e.g.,* Oxford Dictionaries, definition of "exclusively," available at http://oxforddictionaries.com/definition/american_english/exclusively?region=us&q=exclusively

organization be operated "exclusively" for certain tax-exempt purposes "plainly means that the presence of a single [non-exempt] purpose, *if substantial in nature*, will destroy the exemption regardless of the number or importance of truly [exempt] purposes."[24] In other words, an organization may engage in activities for a non-exempt purpose so long as those activities are insubstantial. The Court found the organization did not qualify for the exemption because "an important, if not the primary, pursuit" of the group was engaging in non-exempt purpose activities.[25]

This case may provide support for the IRS's interpretation of the law to permit 501(c)(4) groups to engage in some campaign activity even though the statute says they must be operated "exclusively" for social welfare purposes. Additional support might be found in the IRC's income tax scheme on 501(c) groups with unrelated business income,[26] as it may suggest that Congress recognized 501(c) organizations could engage in some activity outside their tax-exempt purpose. Some, while conceding these points, might still argue that the IRS nonetheless was wrong to use "primarily" as the standard because it may permit more campaign activity than would be allowed under a "substantial in nature" test. The basis for this argument is that the regulation's use of the term "primarily" may suggest campaign activity is permissible so long as it (and any other non-exempt purpose activity) is less than 50% of the group's activities, while an "insubstantial" standard would seem to permit a lesser amount of such activity.[27] In order to assess this argument, it seems necessary to have a better understanding of how the IRS interprets the regulation in practice.[28]

A potential added wrinkle is that the primary purpose test is found in a regulation. Courts grant varying levels of deference to agency interpretations of statutes,[29] and it is possible a court might provide the regulation with the highest level of deference.[30] Under it, a court first looks at whether Congress has "directly spoken to the precise question at issue."[31] If yes, then that is the end of the matter because the "law must be given effect."[32] But if the statute does not directly address the issue, then "the court does not simply impose its own construction of the statute," but rather determines whether the agency interpretation is a permissible construction of the statute.[33] If so, the court will generally defer to the agency's position,[34] regardless of whether "it is the only

[24] Better Business Bureau of Washington D.C., Inc. v. United States, 326 U.S. 279 (1945) (emphasis added).

[25] *Id*. at 283.

[26] I.R.C. §§511-14.

[27] For example, "no substantial part" of a 501(c)(3) group's activities may be lobbying, and some case law suggests that "no substantial part" is between 5% and 20% of the organization's expenditures. *See* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955); Haswell v. United States, 500 F.2d 1133, 1146-47 (Ct. Cl. 1974).

[28] *Cf.* Miriam Galston, *Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165 (2006) (suggesting the existing regulation could be read as limiting campaign activity to an insubstantial amount).

[29] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[30] *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) ("The principles underlying our decision in *Chevron* apply with full force in the tax context."). *Chevron* deference applies when an agency's interpretation is the product of a formal agency process, such as notice-and-comment rulemaking, through which Congress has authorized the agency "to speak with the force of law." United States v. Mead Corp., 533 U.S. 218, 229 (2001).

[31] *Chevron*, 467 U.S. at 842.

[32] *Id*. at 843.

[33] *Id*.

[34] *See, e.g.*, Astrue v. Capato, 132 S. Ct. 2021 (2012) (deferring to the Social Security Administration's longstanding interpretation in regulations, finding the regulations "warrant the Court's approbation" as they were "neither arbitrary

possible interpretation or even the one a court might think best."[35] Here, if a court found that Congress did not speak to the issue, as perhaps evidenced by the Supreme Court's 1945 case, then a court might uphold the regulation's interpretation as permissible, even if other interpretations could also be justified.

How Much Campaign Activity Can Groups Engage In?

The tax code and regulations do not address how to determine whether a 501(c)(4) organization's campaign activity (and any other non-exempt purposes activity) is its primary activity. Applying the standard that campaign activity (along with any other non-exempt purpose activity) cannot be the organization's primary activity raises three basic questions: what does "primary" mean; what is considered campaign activity; and how are the organization's activities to be measured. There does not appear to be any significant IRS guidance on these issues. Because of these uncertainties, the argument has been made that the campaign intervention standard for 501(c)(4) organizations is unconstitutionally vague.[36]

First, the common meaning of "primarily" suggests more than 50%.[37] Some commentators have suggested that a more stringent standard be used. For example, one expert in the area of tax-exempt organizations and electioneering has advocated for a standard that requires a 501(c)(4) organization's campaign activity, along with any other non-exempt purpose activities, be "insubstantial."[38] Others have suggested that a bright-line standard, such as one providing a safe harbor under which an organization would not lose its 501(c)(4) status so long as its campaign activity expenditures did not exceed 40% of its total program expenditures.[39] Others have suggested lower thresholds, such as capping campaign expenditures at no more than 5% or 10% of total annual expenditures,[40] or providing a safe harbor for groups who spend no more than 25% on campaign activity.[41]

Second, the tax code and regulations do not provide much insight into what constitutes campaign activity. Under guidance for similar "campaign intervention" language in Section 501(c)(3),[42] the

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or capricious in substance, [n]or manifestly contrary to statute") (internal quotations omitted).

[35] Holder v. Gutierrez, 132 S. Ct. 2011, 2017 (Jan. 18, 2012) (citing *Chevron*, 467 U.S. at 843-44).

[36] *See, e.g., Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics* (May 25, 2004), at 35-37 [hereinafter *Task Force Comments*], available at http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf. The void-for-vagueness concern was one issue in a recent case, but the case was dismissed on procedural grounds. *See* Christian Coal. of Florida, Inc. v. United States, No. 5:09-cv-00144-WTH-GRJ, 2010 U.S. Dist. LEXIS 80186 (M.D. Fla., 2010), aff'd by 662 F.3d 1182 (11th Cir. 2011).

[37] *See Task Force Comments, supra* note 36 at 39 ("Many practitioners believe that 'less than primary' means less than 50% of an organization's expenditures in a year.").

[38] *See* Miriam Galston, *Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165 (2006) (also arguing that such an interpretation could be consistent with the existing regulation—i.e., the IRS would not necessarily be required to promulgate a new regulation).

[39] *See Task Force Comments, supra* note 36, at 44-51 (also suggesting, in the absence of a safe harbor, to use the 40% standard to create a rebuttable presumption that the group was not a Section 527 political organization).

[40] *See* Democracy 21 and Campaign Legal Center, *Petition for Rulemaking on Campaign Activities by Section 501(c)(4) Organizations*, July 27, 2011, at 3, available at http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/D21_and_CLC_Petition_to_IRS_7_27_2011.pdf.

[41] *See* Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, Working Paper Series No. 151 (Aug. 31, 2011), at 37, http://ssrn.com/abstract=1920269.

[42] I.R.C. §501(c)(3) (prohibits the charitable organizations described therein from "participat[ing] in, or interven[ing] in any political campaign on behalf of (or in opposition to) any candidate for public office"). The guidance interpreting this language is helpful in the 501(c)(4) context. *See* Rev. Rul. 81-95, 1981-1 C.B. 332.

test for classifying something as campaign activity is whether the activity indicates a preference for or against a candidate.[43] One perennial issue is that it can often be difficult to determine whether an activity is campaign intervention. Preferences can be subtle and there is no requirement the organization expressly advocate for the election or defeat of the candidate in order for its actions to count as campaign activity.[44] Whether an activity is campaign intervention depends on the facts and circumstances of each case.

Third, it is unclear how best to assess the level of the organization's campaign activities. For example, campaign activity could be measured solely by expenditures[45] and/or other quantitative factors (e.g., the number of volunteer hours spent on campaign activity). Or, an attempt could be made to examine the organization's campaigning in the broad context of its purpose and activities.[46] In a March 2012 private letter ruling, the IRS, in finding that a 501(c)(4) group had failed to establish that its primary activity was not campaign activity, explained that whether the primary purpose test is met depends on the facts and circumstances of each case, looking at a variety of factors.[47] These factors include the manner in which the organization's activities are conducted; the resources used in conducting the activities (e.g., buildings and equipment); the time devoted to activities by employees and volunteers; the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities. This suggests the IRS does not simply look at the amount of expenditures spent on any one activity. On the other hand, if, as some have argued, the campaign intervention standard is unconstitutionally vague,[48] then this could limit how the IRS applies the test and the factors it may consider.

How Can the Determination of "Too Much" Campaign Activity Be Made?

In order to determine whether a group has violated the primary purpose test, it is necessary to know how much campaign activity it conducted and information about its other activities. A key source for the information is the Form 990, which groups must file annually with the IRS. This form is discussed below in "Reporting Requirements."

Allegations that a 501(c)(4) group has engaged in too much campaign activity are occasionally made during an election cycle, such as after the group runs a series of ads. An important point to keep in mind is that the determination of whether a group has engaged in too much campaign activity is made by examining, at a minimum, all of its activities during the entire tax year (which is not necessarily the calendar year). Thus, it is not possible to make the determination by looking

[43] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (analyzing circumstances under which activities such as conducting voter registration drives, inviting candidates to speak at an organization's function, engaging in issue advocacy, and selling goods or services to candidates are categorized as impermissible campaign intervention for 501(c)(3) groups).

[44] For example, there are numerous ways in a which a voter guide distributed by an organization could display a preference for or against a candidate without expressly advocating for him or her, such as by comparing the organization's position on issues with those of the candidates or by only covering issues that are important to the organization as opposed to a range of issues of interest to the general public. *See* IRS FS-2006-17 (Feb. 2006); Rev. Rul. 78-248, 1978-1 C.B. 154. *See also* CRS Report R42684, *Political Ads: Issue Advocacy or Campaign Activity Under the Tax Code?*, by Erika K. Lunder.

[45] *See Task Force Comments, supra* note 36, at 43-51 (suggesting that political expenditures be the sole measure).

[46] *See, e.g.*, Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855-56 (10th Cir. 1972) (rejecting a bright-line expenditure test for determining whether a 501(c)(3) organization's lobbying was "no substantial part" of its activities and instead examining the extent of its lobbying in relation to its "objectives and circumstances").

[47] See Priv. Ltr. Rul. 201224034 (March 21, 2012).

[48] *See* discussion *supra* note 36.

solely at a group's big ad buy or several months of pre-election activity. Rather, any determination would have to wait at least until the end of the tax year and require looking at all of the organization's activities, both campaign and non-campaign related.

Complaints have been filed with the IRS alleging that some high-profile groups should have their 501(c)(4) status revoked.[49] The IRS may not disclose any action it might be taking with respect to these complaints and, when releasing revocation rulings, must redact identifying information.[50]

Restriction on Serving Private Interests

The IRS interprets the IRC to impose an additional limitation on the ability of 501(c)(4) organizations to engage in campaign activity. This restriction is also rooted in the regulatory requirement that a 501(c)(4) organization be "primarily engaged in promoting in some way the common good and general welfare of the people of the community."[51] This has been interpreted to mean that a group cannot primarily serve a private benefit, even if the organization provides a substantial benefit to the public.[52] Applying the principle in this context, the IRS has ruled that an organization that primarily benefits partisan interests jeopardizes its 501(c)(4) status.[53]

Section 527(f) Tax

Even though 501(c)(4) organizations may engage in campaign activity under the IRC, they are subject to tax under IRC Section 527(f) if they make an expenditure for "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors." The tax is imposed at the highest corporate rate (currently 35%) on the lesser of the organization's net investment income or amount of these expenditures.

For organizations with little or no net investment income or those making low-cost expenditures, the tax is of minimal import. For others groups, however, it might serve as a disincentive to engage directly in the activities giving rise to the taxable expenditures. 501(c)(4) organizations may lawfully avoid the tax by setting up a separate segregated fund to conduct the taxable political activities. The fund would be treated as a separate Section 527 political organization and be subject to applicable tax and campaign finance laws.

[49] *See, e.g.,* Letter from J. Gerald Herbert, Executive Director, Campaign Legal Center, and Fred Wertheimer, President, Democracy 21 to Douglas H. Shulman, Commissioner, IRS, and Lois Lerner, Direct, Exempt Organizations, IRS, dated April 17, 2012, available at http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/IRS_LETTER_CROSSROADS_GPS_4_17_12.pdf (asking the IRS to investigate Crossroads GPS, Priorities USA, American Action Network and Americans Elect).

[50] *See* I.R.C. §§6103, 6110.

[51] Treas. Reg. §1.501(c)(4)-1(a)(2)(i).

[52] *See* Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d 684 (2d Cir. 1973).

[53] *See, e.g.,* Priv. Ltr. Rul. 201221025 (March 2, 2012). *Cf.* American Campaign Academy v. Comm'r, 92 T.C. 1053 (1989) (ruling that an organization that operates for the benefit of private interests, such as members and entities of one political party, on a more than insubstantial basis, may not qualify for 501(c)(3) status).

Regulation of Political Committees

Allegations that a specific 501(c)(4) organization has violated the law often include the claim that the organization should be required to register as a political committee under FECA.[54] Whether an entity is required to register as a political committee is important because registered political committees must raise and spend funds subject to FECA contribution limits, source restrictions, and disclosure requirements.[55]

FECA and applicable Supreme Court precedent regulate "political committees," defining them to include "any committee, club, association, or other group of persons that receives contributions or makes expenditures aggregating in excess of $1,000 during a calendar year"[56] whose major purpose is to elect federal candidates to office. FECA further defines "contribution" and "expenditure" as monies or anything of value "for the purpose of influencing any election for Federal office."[57] Under FECA, political committees must register with the FEC and file periodic reports identifying contributions, expenditures, and the identity of any person who contributes more than $200 during a calendar year.[58]

In its landmark 1976 decision *Buckley v. Valeo*,[59] the Supreme Court clarified the FECA definitions of "contribution" and "expenditure," and added a requirement in order for non-candidate controlled organizations to be considered "political committees." In order to preserve FECA's regulation of contributions and expenditures against invalidation on vagueness grounds, the Court construed the terms, "contribution" and "expenditure" to encompass only funds donated or spent for express advocacy (that is, voter communications using explicit phrases and words such as "vote for," "vote against," "elect," and "defeat").[60] Likewise, the Court construed the term "political committee" to include only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[61] In so doing, the *Buckley* Court established the "major purpose test," which determines whether or not an organization, if it raises more than $1,000 in "contributions" or makes more than $1,000 in "expenditures," is subject to regulation under FECA as a "political committee."[62]

Neither FECA nor the Supreme Court, however, has yet defined precisely *how* to ascertain the major purpose of an organization. Indeed, the questions of how the major purpose test works, and

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[54] *See, e.g.*, Letter from Robert F. Bauer, General Counsel, Obama for America to John C. Keeney, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, dated Aug. 21, 2008, available at http://www.politico.com/static/PPM106_keeney.html (alleging that the American Issues Project, a group that ran ads against then-candidate Barack Obama, was violating the tax laws because it did not qualify for 501(c)(4) status due to its substantial campaign activities and the campaign finance laws after it failed to register as a political committee).

[55] FECA requires regular filing of disclosure reports by political committees of contributions and expenditures, and by "persons" making independent expenditures that aggregate more than $250 in a calendar year. *See* 2 U.S.C. §434 (a), (c). FECA defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. *See* 2 U.S.C. §431(11).

[56] 2 U.S.C. §431(4)(A).

[57] FECA generally defines "contribution" to include any gift, subscription, loan, or anything of value made for the purpose of influencing a federal election. 2 U.S.C. §431(8)(A),(B). FECA generally defines "expenditure" to include any purchase, payment, or anything of value made for the purpose of influencing a federal election. 2 U.S.C. §431(9)(A),(B).

[58] 2 U.S.C. §§432-437.

[59] 424 U.S. 1 (1976).

[60] *Id.* at 44, note 52.

[61] *Id.* at 79.

[62] *See* 2 U.S.C. §431(4)(A).

to what groups it applies, are at the heart of a debate concerning the circumstances under which non-party organizations and non-candidate committees can constitutionally be considered FECA-regulated "political committees."

There are two basic issues in dispute. First, there is a question as to what *degree* an organization's purpose must be the nomination or election of a candidate to trigger regulation as a political committee. For example, one might argue that it is unlikely that any IRC-compliant 501(c)(4) organization would be considered a political committee because if its primary activity is not campaign intervention, then it naturally follows that its major purpose is unlikely to be deemed the nomination and election of a candidate. However, one might also argue that depending on how primary activity is defined under the IRC, and major purpose is defined under FECA, it is possible that an IRC-compliant 501(c)(4) organization could participate in a sufficient amount of campaign activity to trigger the major purpose test threshold, thereby requiring the organization to be registered and regulated as a political committee under FECA.

In addition, there is debate regarding whether express advocacy must be present in an organization's communications in order to meet the major purpose test. For example, some observers proffer that an organization's activities beyond express advocacy are relevant to ascertaining its major purpose, while others maintain that Supreme Court precedent still limits FECA regulation through the designation of "political committee" status to only those organizations engaging in express advocacy.[63]

Reporting Requirements

Internal Revenue Code

Under the IRC, 501(c)(4) organizations must generally file an annual information return (Form 990) with the IRS.[64] Filing organizations are required to report information regarding their political activities on the Schedule C.[65] It requires organizations to (1) describe their direct and indirect political campaign activities; (2) report the amount spent conducting campaign activities and the number of volunteer hours used to conduct those activities; (3) report the amount directly spent for certain political activities and those amounts contributed to other organizations for such activities; (4) report whether a Form 1120-POL (the tax return filed by organizations owing the Section 527(f) tax) was filed for the year; and (5) report the name, address, and employer identification number of every Section 527 political organization (e.g., a PAC, including a Super PAC)[66] to which a payment was made and the amount of such payments, and indicate whether the

[63] *Compare* Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups,* 31 N. KY. L. REV. 341, 355 (2004) (arguing that "it makes no sense" to examine only whether an organization spends most of its funds on express advocacy in order to determine whether its major purpose is nomination or election of a candidate) *with* James Bopp, Jr., and Richard E. Coleson, *The First Amendment is Still not a Loophole: Examining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy,* 31 N. KY. L. REV. 289, 323 (2004) (arguing that "it is only proper" to examine an organization's express advocacy activity in order to determine whether its major purpose is nomination or election of a candidate).

[64] *See* I.R.C. §6033.

[65] The Schedule C is available at http://www.irs.gov/pub/irs-pdf/f990sc.pdf. The IRS created the Schedule C in 2008 as part of significant revisions made by the agency to the Form 990 in order to encourage tax compliance, accountability, and transparency.

[66] For more information on Super PACs, see CRS Report WSLG170, *The Legal and Constitutional Birth of the "Super PAC",* by L. Paige Whitaker.

amounts were paid from internal funds or were contributions received and directly transferred to a separate political organization. No donors are disclosed on the Schedule C.

Certain donors are reported on a different schedule to the Form 990, the Schedule B. These are the group's substantial donors, generally those who contributed at least $5,000 during the year. These are all such contributors, and not just those who gave money for the organization's political activities.

In general, the organization and IRS must make the Form 990 and its schedules publicly available.[67] However, any identifying information of the contributors listed on Schedule B is not subject to public disclosure. IRS Form 4506-A may be used to request the information from the IRS. The IRS does not post the forms of 501(c)(4) groups on its website.[68] Other than contacting the IRS or the organization, an Internet source for Form 990s is generally Guidestar (http://www.guidestar.org).

Does the Gift Tax Apply?

There has been controversy about whether contributions to 501(c)(4) groups are subject to the federal gift tax, which is imposed on an individual's lifetime gifts of property. If the tax does apply, it might provide a disincentive for some individuals to make donations to these organizations in excess of the annual exclusion amount. For analysis of this issue, see CRS Report R42655, *501(c)(4)s and the Gift Tax: Legal Analysis*.

While the Form 990 contains information about 501(c)(4) campaign activity, it is not a particularly timely source for that information. The Form 990 is due on the 15th day of the 5th month following the close of the organization's fiscal year. This means the form is typically not even due until months after an election cycle has ended, which could be even longer if the organization uses a fiscal year that is different from the calendar year. Furthermore, organizations may request an automatic 3-month extension and then an additional, discretionary 3-month extension.

Federal Election Campaign Act

When 501(c) organizations finance certain election related communications, FECA requires that they file reports with the Federal Election Commission (FEC) disclosing information about their donors. The FEC is required to make these reports publicly available on the Internet within 48 hours of receipt or within 24 hours if the report was filed electronically, and available for public inspection in their offices.[69]

Electioneering Communications

With regard to electioneering communications, FECA requires 501(c) organizations[70] making disbursements aggregating over $10,000 during a calendar year to disclose certain information

[67] I.R.C. §6104(b) and (d).

[68] The only forms of tax-exempt organizations that the IRS is required by law to post on its website are those that Section 527 political organizations must file to notify the IRS of their existence (Form 8871) and to report periodically their expenditures and contributors (Form 8872). *See* I.R.C. §527(k). The IRS also posts some political organizations' Form 990s.

[69] 2 U.S.C. §434(a)(11). Campaign finance reports and data can be searched on the FEC's website at http://www.fec.gov/disclosure.shtml.

[70] Specifically, FECA requires any "person" making a disbursement for an electioneering communication to independent expenditures to file disclosure reports, and defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. 2 U.S.C. §§434(f)(1), 431(11).

including the identity and principal place of business of the corporation making the disbursement, the amount of each disbursement over $200, and the names of candidates identified in the communication.[71] Additionally, the organization is required to disclose its donors who contributed at least $1,000. The statute also provides an option for an organization seeking to avoid disclosure of all its donors. If an organization establishes a separate bank account, consisting only of donations from U.S. citizens and legal resident aliens made directly to the account for electioneering communications, then it is required to disclose only those donors who contributed at least $1,000 to the account.[72]

A Federal Election Commission (FEC) regulation provides an exception to the donor disclosure requirement for electioneering communications. The regulation permits corporations—including incorporated 501(c) organizations—and labor unions making disbursements for electioneering communications to disclose only the identity of each person who made a donation of at least $1,000 specifically "for the purpose of furthering" an electioneering communication.[73] This regulation has been the topic of ongoing litigation.

In March 2012, in *Van Hollen v. Federal Election Commission,*[74] a federal district court invalidated this regulation finding that it improperly narrowed the scope of the statute. The court determined that the language of FECA clearly requires that every entity that funds electioneering communications disclose "all contributors" who contributed over $1,000 during the reporting period, and that the FEC could not limit its applicability to those contributors who transmitted funds accompanied by a statement that the contribution was to be used only for the purpose of financing electioneering communications.[75] However, in September 2012, on appeal to the U.S. Court of Appeals for the D.C. Circuit,[76] a three-judge panel reversed the lower court and reinstated the regulation.[77] Disagreeing with the lower court, the D.C. Circuit found that the statute "was anything but clear," and that it could reasonably be construed to include a "purpose" requirement because it only applied to disbursements for the direct costs of producing and airing electioneering communications.[78] The court remanded the case to the district court, instructing it to provide the FEC with the opportunity to revise the regulation through rulemaking, and if the agency did not, ordering the court to determine whether the regulation survived arbitrary and

[71] 2 U.S.C. §434(f).

[72] 2 U.S.C. §434(f)(2)(E),(F).

[73] 11 C.F.R. §104.20(c)(9). This regulation was promulgated in response to the Supreme Court's ruling in *FEC v. Wisconsin Right to Life, Inc.,* 441 U.S. 449 (2007), and prior to its ruling in *Citizens United v. Federal Election Commission,* 130 S. Ct. 876 (2010). For further discussion of these decisions, *see* CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC,* by L. Paige Whitaker and CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.,* by L. Paige Whitaker.

[74] Van Hollen v. FEC, 851 F. Supp. 2d 69 (D.D.C. Mar. 30, 2012), *stay denied*, No. 12-5117 (D.C. Cir. May 14, 2012), *rev'd sub nom.* Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108 (D.C. Cir. Sept. 18, 2012).

[75] *Id.* at 80-81. "Congress made a clear policy choice not to limit the disclosure requirement applicable to any 'person' to whom a contribution is made based on the contributors' individual motivation." *Id.* at 82.

[76] Although the FEC voted not to appeal the district court decision, two defendant-intervenors, Center for Individual Freedom and Hispanic Leadership Fund, filed an appeal. To comport with the ruling, on July 27, 2012, the FEC issued a statement that "[e]ffective March 30, 2012, persons making disbursements for electioneering communications should report 'the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.'" http://www.fec.gov/press/press2012/20120727_VanHollen_v_FEC.shtml.

[77] Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108 (D.C. Cir. Sept. 18, 2012).

[78] *Id.* at 110.

capricious review.[79] In October 2012, the FEC informed the court of its decision not to initiate a rulemaking and to defend the current regulation.[80] Currently, the case is pending before the district court.

Generally, electioneering communication reports are required to be filed by the first date in a calendar year that an organization makes a disbursement aggregating more than $10,000 for the direct costs of producing or airing an electioneering communication. In addition, an organization is required to file a report each time it makes such disbursements aggregating more than $10,000 since the last filing.[81]

Independent Expenditures

FECA requires Section 501(c) organizations[82] making "independent expenditures" that aggregate more than $250 in a calendar year to disclose whether an independent expenditure supports or opposes a candidate, whether it was made independently of a campaign, and the identity of each person who contributed more than $200 to the organization specifically "for the purpose of furthering" an independent expenditure.[83]

Generally, independent expenditure reports are required to be filed quarterly. In addition, up to 20 days before an election, each time that an organization spends at least $10,000 on independent expenditures relating to the same election, it must file a report within 48 hours of incurring the cost of the expenditure. Less than 20 days before an election, each time that an organization spends at least $1,000 on independent expenditures relating to the same election, it must file a report within 24 hours of incurring the cost of the expenditure.[84] FECA regulations require organizations that spend or have reason to expect to spend more than $50,000 on independent expenditures to file reports electronically.[85]

Constitutional Overview

[79] *Id.* at 112.

[80] *See* Federal Election Commission, Record: Litigation," Nov. 2012, *available at* http://www.fec.gov/pages/fecrecord/2012/november/vhvfec.shtml.

[81] 2 U.S.C. §434(f)(4); 11 C.F.R. §104.20.

[82] FECA requires any "person" making independent expenditures to file disclosure reports, and defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. 2 U.S.C. §§434(c)(1), 431(11).

[83] 2 U.S.C. §434(c). In April 2011, Representative Van Hollen filed a petition with the FEC seeking a rulemaking to require organizations that make independent expenditures to disclose the identity of their donors. In December 2011, the FEC deadlocked (voting 3 to 3), and did not initiate the rulemaking, Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting By Persons Other Than Political Committees. See FEC website at http://sers.nictusa.com/fosers, under REG 2011-01, Independent Expenditure Reporting (2011).

[84] 2 U.S.C. §434(c)(2)(C); 11 C.F.R. §109.10.

[85] 11 C.F.R. §104.18(a), 2 U.S.C. §434(a)(11)(A)).

In its landmark 1976 campaign finance decision, *Buckley v. Valeo*,[86] and, most recently, with its 2010 decisions in *Citizens United v. Federal Election Commission*[87] and *Doe v. Reed,*[88] the U.S. Supreme Court has generally affirmed the constitutionality of disclosure requirements. While acknowledging that compelled disclosure can infringe on the right to privacy of association and belief as guaranteed under the First Amendment,[89] the Court has identified overriding governmental interests. In addition, these cases illustrate that in order for exemptions from otherwise valid disclosure regulations to be granted, evidence is required of the likelihood that publicly disclosing personal information will result in threats, harassment, or reprisals from either the government or private persons.

In *Buckley v. Valeo*,[90] the Court identified the governmental interest of providing the electorate with information regarding the source and spending of campaign money in order to assist voters in evaluating candidates to justify campaign finance disclosure requirements.[91] In upholding the constitutionality of FECA's donor disclosure requirements for independent expenditures, the Court found that so long as they encompass only funds used for express advocacy communications, the requirement was constitutional.[92] Such donor disclosure "increases the fund of information" regarding who supports a given candidate, and that informational interest can be equally strong for independent spending as it is for spending that is coordinated with a candidate or party.[93]

In *Citizens United v. Federal Election Commission*,[94] the Court expanded on its holding in *Buckley,* and upheld FECA's disclosure requirements for electioneering communications as applied to a political movie and broadcast advertisements promoting the movie. Citing *Buckley*, the Court found that while they may burden the ability to speak, disclosure requirements "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking."[95] Accordingly, the Court evaluated the regulation under a standard of "exacting scrutiny," a less rigorous standard than "strict scrutiny," which the Court has used to evaluate restrictions on campaign spending. Exacting scrutiny requires a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest.[96]

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[86] 424 U.S. 1 (1976).

[87] 130 S.Ct. 876 (2010).

[88] 130 S.Ct. 2811 (2010).

[89] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[90] 424 U.S. 1 (1976) (per curiam).

[91] *See id.* at 66-68. The Court also identified the governmental interests of deterring actual corruption and the appearance of corruption by exposing large contributions and expenditures, and facilitating detection of violations of law.

[92] *See id.* at 79-80. "[W]hen the maker of the expenditure is … an individual other than a candidate or a group other than a 'political committee,' the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach … is not impermissibly broad, we construe 'expenditure' … to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 79-80.

[93] *Id.* at 81.

[94] 130 S.Ct. 876 (2010).

[95] *Id.* at 914 (quoting Buckley, 424 U.S. at 64).

[96] *Id.*

Notably, in *Citizens United,* the Court expressly rejected the argument that the scope of FECA's disclosure requirements for electioneering communications must be limited to speech that is express advocacy, or the "functional equivalent of express advocacy."[97] In support of its determination, the Court pointed out that in *Buckley* and other cases, it has simultaneously struck down limits on certain types of speech—such as independent expenditure communications—while upholding disclosure requirements for the same type of speech.[98] In response to the argument that disclosure requirements could deter donations to an organization because donors may fear retaliation, the Court stated that such requirements would be unconstitutional as applied to an organization where there was a reasonable probability that its donors would be subject to threats, harassment or reprisals.[99]

In a case upholding the constitutionality of a Washington State public records law, *Doe v. Reed*,[100] the Court relied on and underscored its holdings in *Buckley* and *Citizens United* regarding compelled disclosure. The Washington statute requires that all public records—including signatures on referendum petitions—be made available for public inspection and copying. Categorizing it as a disclosure law and therefore "not a prohibition of speech," the Court evaluated its constitutionality under the First Amendment using the standard of exacting scrutiny.[101] The Court upheld the law as substantially related to the governmental interest of safeguarding the integrity of the electoral process, and announced that public disclosure "promotes transparency and accountability in the electoral process to an extent other measures cannot."[102] Regarding the argument that the disclosure law would subject petition signatories to threats, harassment, and reprisals, the Court found insufficient evidence to support the assertion.[103]

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[97] *Id.* at 915-916.

[98] *See id.* at 915. The Court noted that in its 2003 campaign finance decision, *McConnell v. Federal Election Commission*, three Justices who would have struck down the FECA ban on corporate independent expenditures nonetheless voted to uphold its disclosure and disclaimer requirements. *See id.* (*citing* McConnell v. Federal Election Commission, 540 U.S. 93, 321 (2003) (opinion of Kennedy, J., joined by Rehnquist, C. J., and Scalia, J.). The Court also noted that it has upheld the constitutionality of lobbyist registration and disclosure requirements even though a ban on lobbying would be unconstitutional. *See id.* (*citing* United States v. Harriss, 347 U.S. 612, 625 (1954)).

[99] *See id.* at 916; National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 462-63 (1958).

[100] 130 S.Ct. 2811 (2010).

[101] *Id.* at 2813.

[102] *Id.* at 2820.

[103] *See id.* at 2821.

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