Permissible and Impermissible Activities of Non-Profit Organizations and Public Charities Under Federal Campaign Finance and Tax Laws

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I. Special Guidance to Public Charities Tax-Exempt Under Section 501(c)(3)

The following is an overview of the permissible activities and events all public charities, churches and synagogues may participate in which are not regarded as "campaign activity" in violation of *Internal Revenue Code* section 501(c)(3):

Permissible Voter Registration Drives and Get Out The Vote Efforts

Voter registration and get-out-the-vote drives will not be considered as "participating or intervening in a political campaign" so long as activities are conducted in a neutral, unbiased and nonpartisan manner. See, *Internal Revenue Manual*, Section 7.25.3.7.11.5 (February 23, 1999); *Election Year Issues,* Kindell and Reilly, *Internal Revenue Service, Exempt Organizations Continuing Education Technical Instructional Program for Fiscal Year 2002* ("*Election Year Issues*"). The determination of whether the drive is conducted in a neutral, unbiased and nonpartisan manner is based upon compliance with the following factors:

- no candidate or all candidates for a particular elective office are named or depicted without favoring any candidate over any other in the voter registration or get-out-the-vote communication(s);
- the communication names no political party, except for identifying the political party affiliation of *all* candidates named or depicted;
- the communication is limited to urging acts such as voting and registering to vote and to describing the hours and place of registration and voting; and
- the voter registration and get-out-the-vote drive services are made available without regard to the voters' political preference.

Care must be taken to follow the above guidelines. The IRS has ruled that voter registration materials which referred to a "conservative" agenda and offered specific examples of "liberal" groups and

politicians posing threats to that agenda, violated the political prohibition even though the registration materials did not refer to any conservative candidate by name. *Tax Advice Memorandum* 9117001. Coordinating registration activities with a political committee must also be avoided, and would be a violation of the political intervention prohibition. *Id.* Focusing registration efforts on particular geographical areas, however, does not constitute participation or intervention even if it is known that the area contains predominantly supporters of a particular party or candidate. *Id.* Also, voter registration lists may be used to identify unregistered voters, but no targeting of voters who are registered as belonging to one party or another should be used. *Election Year Issues* at 379.

Permissible Voter Guides

Public charities, churches and synagogues may also prepare and distribute voter guides which include *all* viable candidates for an office, within certain guidelines which must be strictly followed. As with voter registration and get-out-the-vote activities, voter guides must also be neutral, unbiased and nonpartisan, and under no circumstances may it endorse a candidate or direct individuals to vote for or against a candidate. Voter guides should *not* contain editorial comments about any political party aimed at inducing voters in any particular way.

The specific guidelines are found in IRS *Revenue Ruling* 78-248, as amplified in *Revenue Ruling* 80-282, and provide that voter guides must include:

- the voting records of all incumbent members of the legislative body who represent the local area;
- the candidates for reelection will not be identified as incumbents;
- no comment may be made on an individual's overall qualifications for office;
- no statement may be made expressly or impliedly endorsing or rejecting any incumbent or other candidate for public office may be made;
- the voting report should not be linked to any election campaign by, for example, widely

distributing the voter report on the eve of an election; and

- the voting report should cover a broad range of issues and not target issues that track the organization's known "agenda."

Public charities, churches and synagogues must also stay away from rating candidates. The IRS' position is that rating candidates is the equivalent of endorsing candidates and clearly violates the political intervention ban. *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2nd Cir. 1988); *General Counsel Memorandum* 39441 (November 7, 1985); *Tax Advice Memorandum* 963503 (conference of citizens that issued a rating of candidates based on their positions on issues violated the political prohibition).

Candidate Forums and Debates

Public charities, churches and synagogues may sponsor candidate forums or debates. The fundamental requirement is that candidate forums or debates educate voters and not simply assert the virtues of particular candidates. The standards applicable to voter guides noted above also apply to candidate forums. In addition, IRS *Revenue Ruling* 86-95 sets forth the following criteria for a candidate forum that educates voters without also engaging in prohibited campaign activities:

- the forum includes "all legally qualified candidates;"
- covers a broad range of issues;
- poses questions presented by "a non-partisan, independent panel of knowledgeable persons;"
- gives each candidate an equal opportunity to present his or her views; and
- the moderator states at the beginning and end of the program that the views expressed are those of the candidates and not of the organization and that sponsorship of the forum does not constitute an endorsement of any candidate by the organization.

A broad range of issues for this purpose is not limited to any particular number. The IRS has held that a forum that covered just three issues, each of which was an important topic in the campaign, was still neutral. *Tax Advice Memorandum* 9635003. Also, limiting a forum or debate in a primary election to the candidates of one party does not violate the political prohibition. The sponsoring organization does not jeopardize its exempt status by excluding a third party candidate from the two debates among, respectively, the Democratic party candidate and a Republican party candidate. *Fulani v. League of Women Voters*, 684 F. Supp. 1185 (S.D.N.Y. 1988), *affirmed*, 882 F.2d 621 (2nd Cir. 1989). However, limiting debate participants to only "significant" candidates in a party primary is impermissible, and is considered a subjective factor. *Fulani v. Brady*, 809 F. Supp. 1112 (S.D.N.Y. 1993).

A Minister, Priests or Rabbi, Etc., May Individually Endorse a Political Candidate

Religious leaders are not prohibited from speaking as individuals and endorsing a candidate for political office, or speaking out on a matter of public policy. However, because churches and synagogues, as institutions, are not permitted to intervene in political campaigns, whenever a religious leader individually endorses or supports a political candidate it must be done in a way that does not make it appear as if the church or synagogue is endorsing the candidate. This means the religious leader may not use the letterhead or publications of the church or synagogue when an individual endorsement is made. Also, no endorsement may be made during an official church or synagogue function. However, a minister, priest, or rabbi, etc., may be identified in their individual endorsements by the title or position they hold. *IRS Publication 1828*, pp. 7-8.

Public Charities, Churches and Synagogues Need Not Restrict Their Discussion of Issues During Campaign Seasons

The political intervention prohibition does not restrict the discussion or presentation of issues during a campaign season. Public charities, churches and synagogues need not limit or alter their discussion of issues during such times, and the fact that candidates may align themselves on one side or another of an

issue does not adversely affect the right to engage in discussion or presentations of the issue. *Election Year Issues*, at 334-346.

Public Charities, Churches and Synagogues May Participate in Referendums, Constitutional Amendments and Ballot Propositions and Initiatives

Referendums, constitutional amendments, ballot propositions and voter initiatives are classified as lobbying activities. *Tres. Reg. § 1.501(c)(3)-1(c)(3)(ii)*. Public charities, churches and synagogues are permitted to engage in an "insubstantial" amount of lobbying activity. *26 U.S.C. §501(c)(3)*. While neither the *IRC* or IRS regulations define what "insubstantial" means in terms of any specific percentages, court rulings indicate between five and fifteen percent (5%-15%) of total activities would be insubstantial. *See, Haswell v. U.S.*, 500 F2d 1133 (Ct. Cl. 1974)(16% to 20% of total budget was too much); *Seasongood v. Commissioner*, 227 F2d 907 (6th Cir. 1955)(less than 5% of time and effort spent on lobbying within acceptable limit).

The Facilities of Public Charities, Churches and Synagogues May be Used for Civic or Political Events

Public charities, churches and synagogues may permit the use of auditoriums, meeting rooms and gymnasium facilities to be used as polling places on Election Day without violating the political intervention ban. The churches or synagogues facilities may also be rented to candidates or political parties provided they are not provided free or at a reduced charge, are made available to all candidates on the same and equal basis, and provided the church or synagogue does not promote or advertise the use or event. *Election Year Issues* at 383.

A Public Charity, Church or Synagogue May Sell or Rent Its Mailing List to a Candidate or Political Party

A public charity, church or synagogue may sell or rent its mailing list to a candidate or political party without violating the political intervention ban, provided it sells or rents the list on the same basis as it does

to others, and the list is equally available to all candidates and political party. Such mailing lists may not be given without charge or on a selective or preferred basis without violating the in-kind contribution ban. *See, Publication 1828* at 11; *Election Year Issues* at 383-84.

Express Advocacy and Electioneering Communications Prohibited

A public charity, church or synagogue may not engage in "express advocacy" – communications that use the magic words such as "vote for" or "vote against" a candidate or party – or "electioneering communications" – paid broadcast, cable or satellite communications that refer to a clearly identified candidate within 60 days prior to a general election or 30 days prior to a primary election for a federal office.[1]

II. The Supreme Court's Ruling in *McConnell v. FEC*

After a fast-track review, on December 10, 2003, the Court issued a 5-to-4 decision in *McConnell v. Federal Election Commission*, upholding nearly all portions of the *Bipartisan Campaign Reform Act of 2002* (BCRA). The majority of the court ruled:

> "[T]he statute's two principal, complementary features – Congress' effort to plug the soft money loophole and its regulation of electioneering communications – must be upheld in the main."

The majority opinion, written by Justices Stevens and O'Connor, upheld the two key provisions of the campaign finance law: the ban on soft money in federal elections, and the regulation of campaign advertisements disguised as "issue ads." The court did not stop there – nearly every element of BCRA in particular, and campaign finance regulation in general, was supported in the ruling.

Specifically, the court upheld:

- The ban on national parties and officeholders raising and spending "soft money" – the

[1]In the case of Congressional candidates only, the communication must be targeted to the relevant electorate and receivable by 50,000 people. 11 CFR 100.29(a) & (b)

unlimited contributions to parties from corporations, unions and wealthy individuals

- The limit on state parties spending soft money that affects federal elections
- The new definition of campaign advertisements subject to campaign finance regulation and disclosure, as any broadcast ad aired immediately before an election that depicts a federal candidate and targets that candidate's constituency (known as "electioneering communications"). Such ads are now covered under campaign finance limits and disclosure requirements if they are aired 60 days before a general election or 30 days before a primary election
- The requirement that special interest groups use only regulated "hard money" to pay for electioneering communications and disclose where that money came from. Hard money consists of contributions from individuals or political action committees (PACs), subject to contribution limits and disclosure requirements
- The mandate that broadcast stations compile a public record of political ads and who paid for them

The court invalidated only two provisions of the law: the ban on campaign contributions from minors – a challenge put forward and argued by the American Center for Law and Justice – and the requirement that parties choose between making either independent expenditures or coordinated expenditures on behalf of candidates.

Where Nonprofit Organizations Stand

With the upholding of these sweeping revisions of BCRA, the role of non-profit organizations in federal elections has been fundamentally transformed. Non-profit organizations face both new constraints on electioneering activity and new opportunities to play a larger role in the electoral arena.

It is critical in attempting to understand the permissible political activities of non-profit organizations to realize that two different sets of laws regulate these activities: the *Federal Election Campaign Act* (FECA), and the *Internal Revenue Code*. Both laws use different definitions of

"electioneering activities" and seek different objectives in the regulation of organizations.

FECA specifically regulates campaign activity of organizations. In so doing, FECA operates on a very narrow definition of electioneering activity. Under FECA, as amended by BCRA, electioneering activity includes:

- *Express advocacy* communications, which employ the "magic words" of "vote for," "vote against, "elect" or something comparable; and

- *Electioneering communications*, which depict a federal candidate within 60 days of a general or runoff election or 30 days before a primary election, and which target the voting constituency in that election.

The *Internal Revenue Code* specifically regulates the tax status of organizations. As such, the tax code uses a broad definition of *electioneering activity*, which is any activity designed to influence the election or appointment of individuals to federal, state or local office or office in a political organization. Electioneering activities for tax purposes include electioneering issue advocacy and voter mobilization efforts, which commonly are not included in FECA's definition of electioneering.

To confuse matters, the laws apply differently to different classes of organizations. Political committees or PACs, nonprofit organizations under section 527 of the tax code, fall under FECA's definition of electioneering, must register with the Federal Election Commission (FEC), and must abide by all the contribution limits and reporting requirements of federal campaign law.[2] Nonprofit groups that

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[2]*Individuals may donate:*
$2,000 per election (primary, general, and run-off) to each federal candidate;
$25,000 per year to national party committees
$10,000 per year to state party committees
$5,000 per year to each PAC
Subject to $95,000 aggregate limit each two-year election cycle

State party committees may donate:

avoid the express advocacy or electioneering communications definitions of FECA, but which pursue other electioneering activity as their *primary purpose*, must register with the IRS as Section 527 groups. Business, labor and ideological groups that intend to conduct substantial amounts of electioneering activity, but not as the primary purpose of the organization, may register with the IRS as 501(c) nonprofit groups. This entitles them to dramatically reduced disclosure requirements compared to what is imposed on Section 527s groups. Finally, groups that do not plan on conducting substantial lobbying and electioneering activity may register as a 501(c)(3) charity, and receive the unique tax benefit of donor contribution deductibility. All these classes of nonprofit groups file their annual informational and financial tax reports with the IRS and not the FEC, despite their level of electioneering activity.

BCRA has brought three significant changes in federal election law that affect non-profit organizations. First, BCRA places strict limits on the use of soft money by federal officeholders and candidates and the national parties. Second, BCRA extended the definition of campaign activity subject

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$5,000 per election (primary, general, and run-oft) to each federal candidate
Unlimited transfers to other national, state and local party committees
$5,000 per year to each PAC

National party committees may donate:
$35,000 per election (primary, general, and run-oft) to each Senate candidate
$5,000 per election (primary, general, and run-off) to each Congressional and Presidential candidate
Unlimited transfers to other national, state and local party committees
$5,000 per year to each PAC

Multi-candidate PACs may donate:
$5,000 per election (primary, general, and run-off) to each federal candidate
$15,000 per year to a national party committee
$5,000 per year to a state party committee
$5,000 per year to another PAC

to federal election law to include electioneering issue ads designed to promote or attack a candidate but without using the magic words ("vote for," "vote against," etc.). Finally, BCRA imposes stringent disclosure requirements on 527 groups attempting to influence federal elections but that are not otherwise registered with the FEC as a local or non-federal PAC. Federal officeholders and candidates and the national parties had routinely established non-federal accounts of their campaign committees to solicit and spend soft money in federal elections. This is now prohibited.

Section 527 Groups

Historically, section 527 of the *Internal Revenue Code* was used by party committees, which were required to file regular disclosure reports with the FEC. When other groups that were not party-organizations began to register as PACs under section 527, they obtained both tax exemption (although donor contributions were not deductible), and had no obligation to publicly disclose their financial activity. However, since 2001, all 527 organizations must file regular financial disclosure reports with the IRS, similar to the disclosure information that is required of FECA-regulated political committees. These reports must be filed electronically and are available on the IRS Web site in a searchable and downloadable format.

Section 527 groups may still solicit and spend soft money in federal elections, though not for express advocacy or electioneering communications (broadcast ads mentioning a candidate within 60 days of a general election and 30 days of a primary election). This continues to make Section 527s an attractive avenue for those who wish to make soft money expenditures and use this money to promote or oppose federal candidates. Section 527 groups, however, do not have to disclose which candidates are being targeted for election or defeat by their electioneering activities.

501(c) Nonprofit Groups

Similar to their 527 counterparts, 501(c) nonprofit organizations are regulated under the tax

code, and to a lesser degree the elections code. The disclosure laws covering Section 527 groups do not, however, cover other nonprofit groups – specifically, social welfare groups under 501(c)(4); labor unions under 501(c)(5); business leagues under 501(c)(6); social clubs under 501(c)(7); and fraternal organizations under 501(c)(8). While the primary purpose of 527 groups is electioneering activity, 501(c) nonprofit groups (except 501(c)(3) groups) may conduct electioneering activity but not as their primary purpose.[3]

Nonprofit groups are established within the *Internal Revenue Code* primarily to pursue objectives related to the needs of the organization. As a result, 501(c) nonprofits are envisioned by the tax code essentially as lobbying organizations seeking to influence legislation and public policy in ways that are compatible with the mission of the organizations. Labor unions are expected to lobby on labor matters; businesses lobby for business-friendly policies, etc.

501(c) nonprofits (except 501(c)(3)s) may also conduct substantial electioneering activities (except for express advocacy and electioneering communications), so long as those activities are pertinent to the interests of the organization. Precisely how much electioneering activity is permissible is an issue to be decided by the facts-and-circumstances of each particular case, an admittedly uncertain standard (although 15% or so is generally regarded as permissible).

Of particular significance, BCRA's ban on soft money fundraising by federal officials does not apply to 501(c) nonprofit organizations. Federal officials may still raise soft money without limit for nonprofits provided the solicitation is not specifically for federal election activity.[4] Federal officials may

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[3]The permissible activities of 501(c)(3) organizations under the tax code are outlined in Section I of this memo.

[4]National party committees may also solicit funds for, or make a direct contribution to, a tax-exempt 501(c) organization, or an organization that has applied for recognition of exemption, provided the organization does not make any expenditures or disbursements in connection with federal elections, including federal election activity. 11 CFR 300.11(a)

even raise unlimited soft money for the general funds of an organization so long as its "principal purpose" is *not* to conduct political activity such as voter registration, voter identification and get-out-the-vote activities.

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This outline is intended as an informational overview of BCRA and the *Internal Revenue Code* with special emphasis on their implications for 501(c) nonprofit organizations. This outline is not intended and should not be relied upon as legal advice with respect to any particular circumstance or set of facts.