

A Primer on How to Avoid the Pitfalls of Electioneering from a Tax Perspective

Milton Cerny

202.857.1711 | mcerny@mcguirewoods.com

Washington Square
1050 Connecticut Avenue N.W., Suite 1200
Washington, D.C. 20036-5317

www.mcguirewoods.com



McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

INTRODUCTION

On Jan. 21, 2010, the U.S. Supreme Court issued a landmark decision in *Citizens United v. Federal Election Commission* that may have a dramatic impact on the level of spending for political activities by business corporations and nonprofit 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations. The Supreme Court struck down the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibition regarding the use of corporate funds for “independent expenditures” for the express advocacy for the election or defeat of federal, state, or local candidates or their equivalents.

Nonprofit corporations, including labor organizations, trade associations, and grassroots issue organizations, will now be permitted under the federal election laws to spend corporate treasury funds to finance public communications that support or oppose federal candidates for public office, so long as such expenditures are not coordinated with either the candidate or a political party.

Also before *Citizens United*, the 2002 Bipartisan Campaign Reform Act (BCRA) prohibited corporate and union treasuries from funding broadcast advertisements known as *electioneering communications* that mention clearly identified federal candidates (but not necessarily calling for their election or defeat) within 60 days of a general election or 30 days of a primary election. As a result, corporations that wanted to air at least some messages referring to federal candidates during periods preceding elections either had to establish a PAC to receive voluntary contributions to fund the ads or forgo the advertising altogether. Now, however, corporations and unions appear to be free to fund electioneering communications from their treasuries at any time.

However, this decision only overruled an election law restriction on political speech under 2 U.S.C. section 441(b) of the BCRA, but did not cover the Internal Revenue Code (IRC) disallowance of business deductions for political purposes under IRC section 162(e), or the prohibitions and restrictions against political expenditures by section 501(c)(3) organizations and other section 501(c) organizations that could jeopardize their tax-exempt status.

I. POLITICAL ACTIVITIES AND SECTION 501(C) TAX EXEMPTION

A. Section 501(c)(3)

Section 501(c)(3) of the Internal Revenue Code (IRC) precludes exemption of an organization which participates or intervenes in any political activity on behalf of or in opposition to any candidate for elective public office. Reg. sections 1.501(c)(3)-1(c)(3)(ii) and 53.4945-3(a)(2). This is an absolute prohibition. Reg. section 1.501(c)(1)-1(c)(3)(iii). Periodically legislation has been introduced to lessen this strict restriction or limit its affect on religious organizations. See HR 2910 introduced by Rep. Crane and Rep. Rangel on January 31, 1996, that would have permitted churches to devote 5 percent of their gross revenues to a campaign for or against any political candidate. Intervention can also include the publication or distribution of written or printed statements on behalf or in opposition to a candidate. See Rev. Rul. 2007-41, 2007-25 I.R.B. and FS-2006-17, February 2006 (IRS publications regarding political intervention activities).

1. Private foundations

Private foundations risk not only loss of tax-exempt status for engaging in political activity, but are also subject to a series of tiered excise taxes for each infraction. See Section 4945 of the IRC. An initial tax of 20 percent of the expenditure is assessed against the private foundation and 5 percent of the expenditure may be imposed on the foundation managers who knowingly and willfully made the political expenditure. If the act is not corrected by refunding the distribution to the foundation, then there is an additional tax on the private foundation of 100 percent of the amount involved and on the manager of 50 percent of the expenditure.

2. Public charities

If a public charity engages in political activities, it not only risks loss of tax exemption but also is subject to an initial tax of 10 percent of the amount involved, which is increased to a tax of 100 percent if the act is not corrected by return of the funds to the charity. Section 4955(d)(2) of the IRC. The IRS says there is no *de minimis* amount of political intervention but will look to all the facts and circumstances to see if the Section 4955 tax rather than revocation of tax-exempt status would be applied. There is a 2½ percent tax on the organization's manager, unless it can be shown that the act was not willful and was due to reasonable cause. The IRS may in certain cases seek an injunction from the U.S. district court to prevent further political expenditures. Section 7409 of the IRC.

B. Permitted Activities as Distinguished from Electioneering

1. Get-out-the-vote campaigns

Voter education, registration, and get-out-the-vote campaigns all must be nonpartisan. A nonpartisan program is one that does not result in supporting or opposing a candidate, but only attempts to educate the public and encourage them to vote. See LTR 9540044 (women voters in minority communities); LTR 9223050 (homeless); LTR 8822080 (low voter participation); and LTR 8822056 (poor, minority, and immigrant groups).

a. Partisan activities

Activities evidencing a preference or opposition to a candidate, a political party or candidates who have taken particular positions will not qualify as nonpartisan. IRS will look to a program's *substance* and not its *form*.

(1) Examples:

- (a) The practice of rating candidates and the publishing of the ratings for elective office is a political activity. *Association of the Bar of the City of New York v. Commissioner*, 62 AFTR 2d 88-625, 858 F.2d 876 880 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).
- (b) Rev. Rul. 78-248, 1978-1, C.B. 154. The IRS described four situations in which the compilation of voting records and questions were either political or nonpartisan activities.

- (c) Rev. Rul. 80-282, 1980-2 C.B. 178, amplifying Rev. Rul. 78-248, described factors that led the IRS to conclude that the distribution of voting records was not a political activity because voting records were distributed to a limited group rather than as a mass distribution and such distribution was not timed to coincide with a particular election.
- (d) Prohibited activities:
- Making contributions to candidates or parties including “in kind” contributions of services, publicity, advertising, paid staff time, and use of facilities (xeroxing, postage meter, etc.).
 - Establishment of a segregated fund for political expenditures or managing a PAC.
 - Evaluating candidates or their positions.
 - Coordination of activities with a candidate. See GCM 39811 where organizations urged members to attend party caucuses and to vote for anti-choice candidates.
- (e) The IRS has found and the Tax Court agreed that a “secondary private benefit” to a political party may occur even if the activity itself was educational. See *American Campaign Academy*, 92 T.C. 1053 (1989), where a training school for campaign staff workers was denied exemption under section 501(c)(3) because it benefited the Republican party.

b. Voter registration activities

- (1) Identification of unregistered voters during an election campaign is a permissible activity. The organization may target specific voters who are unrepresented or historically have not voted. A charity must not make its choices with a view of affecting the outcome of a particular election. The selection should be based on neutral and nonpartisan selection criteria arising naturally out of the charity’s charitable purpose.
- (2) Impermissible activities:
- (a) Picking sites in cooperation with an election campaign.
 - (b) Picking sites based on candidates where activity is undertaken to defeat candidates that have expressed views contrary to those of the organization.
 - (c) Picking sites because a particular candidate belongs to the group.
 - (d) Zeroing in on candidates in swing states.
- (3) Private foundation grants for voter registration drives
- (a) Section 4945(f) allows grants specifically earmarked for voter registration if:

- grant is paid to a section 501(c)(3) organization;
- grant supports nonpartisan activities not confined to one election period and carried on in five or more states;
- substantially all of the income is expended directly for the active conduct of voter registration;
- not more than 25 percent of the support for the activity comes from any one private foundation; and
- donated funds are not restricted for use in any particular political subdivision.

2. Discussion of issues v. electioneering

- a. **General rule** — a charity can focus on the issues in structuring voter registration and get-out-the-vote campaigns. The charity can continue normal public education programs during election periods even if the issues are controversial or policy issues of concern to the voting public.
- b. **Caution** — the focus must be on promoting the charity’s viewpoint on those issues and not promoting the candidates’ views. See LTR. 9609007.
 - (1) Issue education can become partisan even without mentioning a candidate by name. Rev. Rul. 80-282 holds that issue advocacy is permissible.
 - (2) Narrow issue organizations, e. g., parental consent on abortion law for minors, could have a more difficult time than a “children’s issues” organization. Because of the broad range of potential issues that apply to children, they are less identified with a particular candidate. The single-issue organization’s safest course of action during the final stage of a political campaign may be to refrain altogether from mass-media voter advertisements.
 - (3) Candidate forums are a permissible vehicle to produce public debate, as long as a bias or preference is not shown to any specified candidate. See Rev. Rul 66-256, 1966-2 C.B. 210; Rev. Rul. 86-95, 1986-2 C.B. 73. The following rules should be observed:
 - (a) The sponsoring organization should have a record of concern with public and legislative matters.
 - (b) All viable candidates should be invited.
 - (c) Choice of forum should be based on nonpolitical considerations.
 - (d) A broad range of issues should be discussed.
 - (e) Questions should be prepared and presented by a nonpartisan panel of knowledgeable persons.

- (f) Each candidate must be given an equal opportunity to present his or her views.
- (g) Questioning must not be biased.
- (h) The forum must be run by a nonpartisan moderator.
- (i) Moderator must state at the beginning and the end of the program that the views expressed are those of the speaker and not the sponsoring charity.
- (j) Moderator should state that all candidates have been invited.
- (k) Organization can report on what happened at the forum without any editorial comments.

C. Voting Records

1. **Permissible activity** — circulation of questionnaires to candidates, tabulation, and dissemination of results are not electioneering as long as questionnaire is unbiased and covers a wide range of issues. Rev. Rul. 78-248, 1978-1 C.B. 154; Rev. Rul. 80-282, 1980-2 C.B. 178; GCM 38444; and GCM 38137.
2. **Nonpartisan guidelines that should be followed:**
 - a. Voting records of all incumbents who represent the region should be included;
 - b. Report should not identify legislation with candidates for re-election;
 - c. Voting records should not be limited to any election campaign;
 - d. Voting analysis should cover a broad range of issues; and
 - e. A voting record must be presented in such a manner that it does not imply approval or disapproval of a candidate. Designations “+” or “-” may, however, be used to show whether each candidate agrees or disagrees with the organization’s views on the issue if:
 - the organization has tracked the legislative record for an extended period, and
 - distribution of voting records is limited to a small number of individuals.

D. Public Opinion Polls

1. **General rule** — charity is free to continue taking public opinion polls during an election campaign if:
 - a. The polls are found to be fair and neutral;
 - b. The organization uses accepted scientific polling techniques; and
 - c. The questions do not directly or indirectly concern the records or positions of particular candidates or parties.

E. Release of Staff to Work on Political Campaigns and Provide Office and Other Services

1. **General rule** — staff members can work on their own time and not act in any official capacity representing the charity. The charity cannot, without reimbursement, provide office space, clerical support, supplies, etc. to political candidate or party.
2. **Membership mailing lists** — can be used if access is provided to other candidates and parties based on standards applicable to another customer. Fair market value reimbursement must be obtained for the use of the list. It is preferable to turn the list over to a mailing list broker. The first sale should not be to a PAC.

F. Ballot Measures

Even though ballot measures may be closely affiliated with the views of a particular candidate, the IRS has held that these activities are more analogous to direct lobbying rather than political activity.

G. Affiliated Section 501(c)(6) or 501(c)(4), Action Organizations and Segregated Funds

1. **General rule** — a section 501(c)(6) or 501(c)(4) organization cannot make a direct contribution from its treasury funds to a political candidate. It can, however, create a separate segregated fund to raise money for political activities from its members.
2. **Reg. section 501(c)(3) organizations** — a section 501(c)(3) cannot be identified with a separate segregated political fund. Thus, a charity must avoid direct or indirect cooperation with a political campaign. This does not preclude a section 501(c)(3) organization from establishing a section 501(c)(4) organization that would have a separate segregated PAC that could solicit its membership for political purposes.

II. THE AFFILIATED SECTION 501(C)(3), 501(C)(4), 501(C)(6), AND PAC COMBINATIONS

A. Seminal Rule

A section 501(c)(3) organization should not be involved with a PAC. The situation becomes more complicated when the charity has a section 501(c)(4) affiliate. The IRC permits section 501(c)(4) organizations to engage in direct political activity, such as urging members to vote for particular candidates, so long as electioneering is not the section 501(c)(4)'s primary activity. See Rev. Rul. 81-95, 1981-C.B.-332. The situation becomes still more complicated when the section 501(c)(4) in turn operates a PAC, which, unlike a section 501(c)(4), can contribute money to federal candidates. Section 501(c)(4) organizations cannot contribute money to federal candidates; this would be a prohibited corporate contribution under the federal election campaign finance law. The danger inherent in such affiliations is that the operation of the PAC may provide a basis for an IRS claim that the charity is trying to do indirectly what it cannot do directly — engage in political activity and give money to political campaigns.

B. Improper Cooperation or Coordination of Events Between a Section 501(c)(3), 501(c)(4), and/or PAC

Because a charity must avoid direct or indirect cooperation with a political campaign, it is important that it avoid coordinating its program with partisan activities of an affiliated section 501(c)(4) or PAC. Such coordination will constitute strong evidence that the section 501(c)(3) and the section 501(c)(4) or PAC are functioning in effect as a single electioneering machine.

The following examples are typical of the type of improper activities that could adversely affect the charity's tax exemption:

1. Conducting a voter registration drive, then giving its affiliated section 501(c)(4) (and no other group) its list of new voters for use in the 501(c)(4)'s political work.
2. Conducting training sessions in get-out-the-vote skills attended primarily by employees of its affiliated section 501(c)(4), who then go out and work for a particular candidate.
3. Renting a mailing list from a PAC, then aiming a get-out-the-vote drive at people on the list.
4. Operating during the early months of an election year on nonpartisan educational work, then closing down right before and going to work for an overtly partisan section 501(c)(4) with a similar name and substantive agenda.
5. Paying the costs of ostensibly nonpartisan events, such as training sessions or issue workshops, but advertising the section 501(c)(4) as the sponsor of the activity in order to enhance its reputation and help its partisan fundraising.

C. Improper Conditions of Fundraising Between a Section 501(c)(3) and a PAC

A charity's fundraising programs must be totally separated from the PAC. Thus, a section 501(c)(3)'s solicitation letters must: (1) be mailed in separate envelopes from any PAC solicitations, (2) be mailed at different times, and (3) make no reference to the PAC. The following are examples of improper coordination by a charity:

1. Soliciting funds for educational purposes, but enclosing a flier containing an appeal for funds from the PAC.
2. Soliciting funds for educational purposes, but adding a "P.S." at the bottom of the page suggesting that donors might also wish to contribute to a PAC.
3. A PAC writes past contributors to inform them of its plans for the coming campaign, adding that its "educational arm" will be contacting them about the charity's need to raise \$50,000 to train volunteers in voter registration skills.
4. Internet website linking a section 501(c)(3) to an affiliated section 501(c)(4) organization for political activity can jeopardize a 501(c)(3)'s tax exemption. See TAM 200908050. Also see LTR 200928045.

III. THE SEPARATE SEGREGATED FUND

A. Political Organizations

Political organizations are defined as parties, committees, associations, funds, or other organizations (whether or not incorporated) organized and operated primarily for the purpose of accepting contributions and/or making an expenditure for an “exempt function.” The definitions discussed are generally applicable to the IRC and the Federal Election Commission Act (FECA) unless otherwise specified. Our discussion will be limited to issues relating to campaigns for elected public office and not “political activities” regarding confirmation hearings on presidential nominees for nonelective office. In that regard, see GCM 39694.

Definitions:

1. Connected PAC

A connected PAC is treated as a separate segregated fund under IRC section 527(c). Contributions of money or other property, membership dues, fees, assessments or proceeds from political fundraising events, and sales of political campaign material are all considered as exempt function income. Fundraising events must be political in nature and not carried on in the ordinary course of business. Taxable income includes such items as expenditures for illegal purposes, for nonexempt function activities, investment income, expenditures used for the personal use of an individual, and excess funding after a campaign.

2. Nonconnected PAC

The nonconnected PAC must be organized and operate for the primary purpose of carrying on political activities. The organization does not need to be separately chartered or established as a corporation, trust, or association. A separate bank account in which political campaign funds are deposited and distributed only for political campaign purposes can qualify. The operational test is satisfied if its primary activities are political activities including influencing or attempting to influence the selection, nomination, election, or appointment of any person to a political office.

3. Who is a candidate?

- a. According to IRS rules, a “candidate” is anyone who offers himself or is proposed by others as a contestant for an elective public office whether national, state, or local. See Reg. sections 1.501(c)(3)- 1(c)(3)(iii) and 53.4945-3(a)(2). See GCM 39811.
- b. The Federal Election Commission definition of a candidate for federal office is found in U.S.C. section 431(2); 11 C.F.R. 100.3(a). The individual must have received or spent \$5,000 or more in seeking the nomination, or given his/her consent to another person to seek or expend such funds, or who, after receiving notice from the Federal Election Commission, has failed to disavow the actions of such person. There is an exception for a “testing of the waters” when an individual spends up to \$5,000 to determine whether to be a candidate. See 11 C.F.R. 100.7(b)(1)(i) and 11 C.F.R. 100.8(b)(1)(ii).

4. Exempt function

“Exempt function” is defined as 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. See section 527(e) of the IRC. The IRS indicates that these expenditures may be either direct or indirect. See Reg. section 1.527-2(c). Note that this definition does not include lobbying. See LTR 9244003, where the IRS held that a ballot initiative was grassroots lobbying under Reg. section 1.162-20(c)(4). Substantial lobbying can result in the loss of section 527 status.

- a.** *Directly related expenses* include expenses for all activities related to supporting the election process. Reg. section 1.527-2(c)(1). The election process includes the influence of selecting for nomination, election or appointment any individual to public office by providing:
- (1) Travel, lodging, and meal expenditures incurred by a candidate travelling through a state to rally support for an election. Reg. section 1.527-(c)(5)(ii). See LTR 9320002.
 - (2) Expenditures for a candidate’s spouse’s participation — if it is important to garner support for the candidate’s election. Reg. section 1.527-2(c)(5)(ii).
 - (3) Voice and speech lessons for a candidate to improve campaigning skills. Reg. 1.527-2(c)(5)(ii).
 - (4) Expenses of attending a testimonial dinner to aid a re-election effort. Reg. section 1.527-2(c)(5)(iv). But charitable donations to sponsoring organization are not. See LTR 9320002.
 - (5) Expenses of an election-night party for campaign workers. Rev. Rul. 87-119, 1987-2 C.B. 151. See also LTR 8650001, where the IRS permitted expenditures for the entertainment of political figures to facilitate fundraising for election.
 - (6) Cash awards to campaign workers after the election is completed — if the amount given each worker is reasonable considering the services performed. Rev. Rul. 87-119, 1987-2 C.B. 151.
 - (7) Amounts expended for voter research, public opinion polls, and voter canvasses for a second office even if paid from a surplus from another campaign. Rev. Rul. 78-13, 1979-1 C.B. 208. See LTR 8243142.
 - (8) Office expenses of a public officeholder if expenses would be deductible as business expenses under Reg. section 162(a). Reg. section 527(e)(2). See LTR 9409003 and LTR 8627008.
 - (9) Political activities occurring between election cycles if directly related to the selection process in the next campaign, e.g., party convention. See S. Rep. No. 1357, 93d Cong. 2d Sess. 27 (1974), Rev. Rul. 79-12, 19791 C.B. 208.
- b.** *Indirect expenses* include expenditures such as soliciting contributions and expenses for overhead and recordkeeping. Reg. section 1.527-

2(c)(2). Also see LTR 8316079 regarding expenditures for operating a headquarters building.

- c. *Expenses of termination* include payment of campaign debts, winding-up costs of the campaign, and distributions to a 501(c)(3) organization. See LTR 9425032.
- d. *Illegal activity expenses* are not considered exempt function expenses. However, defense of civil or criminal suits against the political organization or individual acting on its behalf is an exempt function expense only if the payments are not part of an inducement to engage in the illegal activity or compensation for engaging in it. Reg. section 1.527-5(a)(2).

B. Public Office

The IRS looks to Treas. Reg. 53.4946-1(g)(2) for the definition of a “public office.” See Reg. section 1.527-2(d). As a “rule of thumb” the essential element is whether a significant part of the activities of the office consists of the independent performance of policymaking functions. Reg. section 53.4946-1(g)(2)(1).

C. Segregated Funds

A political organization need not have any particular structure. A bank account can constitute a political organization if it is a “segregated fund.” These are funds established and maintained primarily as political organizations of a corporation or an individual separate from the assets of the corporation or the personal assets of the individual. See LTR 8852037 and LTR 8502003 regarding separate and general accounts. These funds receive, segregate, and disburse income and earnings *only* for exempt (political) function activities. The IRS has held in LTR 9409003 that insubstantial expenditures for nonexempt functions will not preclude the fund from being treated as a segregated fund under section 527(c).

1. Exempt function income

Includes contributions of money or other property; membership dues, fees, or assessments; proceeds from political fundraising events; or sales of political campaign material, but only to the extent such income is placed in a segregated fund upon receipt. See Reg. section 1.527-2(c)(1).

a. Contributions

Generally, money or other property, including funds received pursuant to federal, state, or local campaign financing laws, including support described in section 271(b)(2) of the IRC. See Reg. section 1.527-3(b). Note that no business deduction under section 162(e) of the IRC is allowed for expenditures for political campaign purposes.

- (1) Indirect contributions to political candidates are governed by section 276 of the IRC. This provision disallows deductions not only to announced candidates, but also to those generally believed to be seeking office. Also, see LTR 9433001 where the IRS held that funds that were contributed by a section 501(c)(6) to a PAC without designation for exempt functions purposes but were used for such purposes were subject to section 527(f) of the IRC.

- (2) A corporation or its PAC may solicit only the stockholders and company executives or administrative personnel.
- (3) Quarterly transfer of political contributions to a separate segregated fund was made “promptly and directly” under Reg. section 1.527-6. See LTR 9245001.

b. Dues, fees, and assessments

Membership fees and assessments are treated as exempt function income to the extent that there are no services, goods, or other items of value received in return. An example is the payment of filing for a candidate. Reg. section 1.527-3(c).

c. Fundraising events

The fundraising event must be political in nature and not carried on in the ordinary course of a trade or business. The event must be a political event other than simply raising campaign funds. Reg. section 1.527-3(d)(1). Thus, a fundraising dinner of a fraternal organization was not a political event. See LTR 9320002.

d. Sale of campaign material

Sale must not be carried on in the ordinary course of a trade or business. Reg. section 1.527-3(e). The sale of nonpolitical artwork, for example, could result in taxable income. Rev. Rul. 80-103, 1980-1 C.B. 120.

e. Bingo

Income from bingo is treated as exempt function income. Section 527(c)(3)(b) of the IRC.

2. Taxable Income

Taxable income is computed by taking the organization’s gross income (excluding exempt function income), deducting the expenses directly connected with the production of the gross income, and making the modifications contained in section 527(c)(2) of the IRC.

a. IRC section 527(c)(2) modifications

- (1) \$100 specific deduction
- (2) No deductions are allowed for section 172 net operating losses or for the special deductions for corporations in IRC sections 241-250.

b. Deductions

- (1) Expenses for depreciation for “directly committed” expenses. Reg. section 1.527-4(c)(1).
- (2) State income taxes paid on nonexempt function income. Rev. Rul. 85-115, 1985-2 C.B. 175.

c. Dual use of property

When property, including facilities, equipment and personnel, is used for both exempt and nonexempt functions, a reasonable allocation must be made. Reg. section 1.527-4(c)(3).

d. Taxable gross income to political organization includes:

- (1) Expenditures of exempt function income for improvements or additions to facilities or equipment which is not used for exempt functions.
- (2) Expenditures for illegal purposes.
- (3) Other exempt function income diverted to nonexempt purposes that result in a direct or indirect financial benefit to the organization. Reg. section 1.527-5(a)(1).
- (4) Investment income used for political activities, except amounts distributed to an interest-bearing checking account. See LTR 9105002; *Alaska Public Service Employees Local 71 v. Commissioner*, T.C. Memo 1991-650 (1991).

e. Expenditures resulting in gross income to an individual

- (1) Funds spent for personal use of an individual are includible in that individual's gross income. Reg. section 1.527-5(a)(1).
- (2) Excess funds remaining after a campaign are includible in an individual's income if he/she exercises control over the funds, unless the funds are held for use in a future campaign. Reg. section 1.527-5(c)(1).

f. Expenditures not treated as income to candidate or to other persons

- (1) Contributions made to another political organization or newsletter fund.
- (2) Contributions to an organization described in IRC section 509(a)(1), (2), or (3). In LTR 9425032, the IRS permitted a candidate to distribute excess political funds to a 501(c)(3) foundation for another public charity established by the candidate.

g. Tax rate

Political organizations are taxed at the highest rate specified in IRC section 11(b) (now 35 percent). If it is a political campaign committee, the rate is the "appropriate graduated rate" specified in section 11(b).

h. IRS filing requirements for nonconnected PACs

- (1) File a Form SS-4 with the IRS Service Center to obtain an employer identification number (EIN).
- (2) No exemption application or Form 990 needs to be filed, because political organizations are treated like corporations — they file a regular return.
- (3) File a Form 1120-POL tax return (if the organization has taxable income) by the 15th day of the 3rd month after the close of the

organization's fiscal year. It is a good idea to file the return even if there is no taxable income, in order to begin the running of the statute of limitations.

- (4) If the organization has capital gains it is calculated under IRC section 1201(a). No deductions are allowed for net operating losses, but deductions are allowed for depreciation, for "directly committed" expenses, and for state income taxes paid on nonexempt function income.

D. Political Activity by Section 501(c)(3) Organizations

1. Charities and educational and other types of organizations, including hospitals, are subject to an absolute prohibition on intervening in political campaign activities for or against a candidate. In addition, political activity may subject the organization and its managers to an excise tax under IRC section 4955, or section 4945 if it is a private foundation, and an injunction under IRC section 7409. See *Association of the Bar of the City of New York v. Commissioner*, 858 F. 2d 876 (2d Cir. 1988), cert. denied, 109 S. Ct. 1591 (1989).
2. Charities can campaign for or against the confirmation of nonelected public officials. However, they are subject to the rules under IRC section 527 for political expenditures for such purposes, because while not prohibited "election" activities, they are still considered political activities.

E. Taxable Corporation

No deduction is available for direct or indirect political contributions. See sections 162(e), and 276 of the IRC. Moreover, any portion of dues to a section 501(c)(4), section 501(c)(5), or section 501(c)(6) organization allocable to or earmarked for political purposes may not be deducted under IRC section 162(e). IRC section 274 deals only with indirect gifts to political parties. IRC section 276 concerns not only contributions to political parties but also aid to candidates. IRC section 276 disallows deductions for advertising, dinners or programs, and inaugural events.

F. Individuals

There is no tax credit or deduction for political contributions.