

NONPROFIT LAW BULLETIN

To: Clients and Friends of the Firm

From: Michael D. Schley

Date: September 16, 2010

Re: New Congressional Report Summarizes Nonprofit Political Restrictions

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During this election season, 501(c)(3) organizations (and even their board members and officers) must keep in mind the legal restrictions on their participation in political activities.

The Congressional Research Service has published a very readable summary of the restrictions that apply under federal tax law. It addresses questions such as:

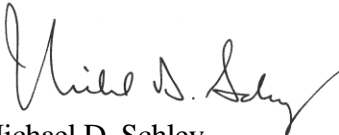
- Can our organization support a candidate for office?
- What are the rules for "Voter Guides"?
- Can we sponsor public forums?
- Can we invite candidates to speak?
- Can we engage in issue advocacy during an election season?
- Are our directors and officers subject to restrictions on what they do personally?

The report is reproduced in full beginning on the following page.

We encourage our clients to remind their boards, officers and staff of these rules during each campaign season.

If you would like additional information, please feel free to contact me.

Sincerely,


Michael D. Schley



501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws

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Summary

During the 2010 election season, the political activities of § 501(c)(3) organizations are in the news, with allegations being made that some groups are engaging in impermissible activities. These groups are absolutely prohibited from participating in campaign activity under the Internal Revenue Code (IRC). On the other hand, they are permitted to engage in nonpartisan political activities (e.g., distributing voter guides and conducting get-out-the-vote drives) that do not support or oppose a candidate. Determining whether an activity violates the IRC prohibition depends on the facts and circumstances of each case, and the line between impermissible and permissible activities can sometimes be difficult to discern.

Due to the IRC prohibition, § 501(c)(3) organizations generally are not permitted to engage in the types of activities regulated by the Federal Election Campaign Act (FECA). However, the activities regulated under the IRC and FECA are not necessarily identical. An organization must comply with any applicable FECA provisions if engaging in activities regulated by FECA (e.g., making an issue advocacy communication under the IRC that constitutes an electioneering communication under FECA).

A recent Supreme Court case, *Citizens United v. FEC*, has received considerable attention for invalidating several long-standing prohibitions in FECA on corporate and labor union campaign treasury spending. This case does not appear to significantly impact the political activities of § 501(c)(3) organizations as they remain subject to the prohibition on such activity under the IRC. Similarly, while numerous bills have been introduced in the 111th Congress in response to *Citizens United*, it appears most would only minimally impact the activities of § 501(c)(3) organizations since they are already generally prohibited from engaging in the activities regulated under the bills. The primary legislative response to *Citizens United*, the DISCLOSE ACT (H.R. 5175, as passed by the House, and S. 3628) would expressly exempt § 501(c)(3) organizations from the legislation's disclosure and disclaimer provisions.

This report examines the restrictions imposed on campaign activity by § 501(c)(3) organizations under the tax and campaign finance laws. For a discussion limited to the ability of churches and other religious organizations to engage in campaign activity, see CRS Report RL34447, *Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker.

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Charities, churches, and private schools are among the organizations that qualify for tax-exempt status as organizations described in § 501(c)(3)¹ of the Internal Revenue Code (IRC).² Benefits that arise from this status include exemption from federal income taxes and eligibility to receive tax-deductible contributions.³ One restriction that arises is that these organizations are prohibited under the tax code from engaging in campaign activity. Separate from the tax code's prohibition, the Federal Election Campaign Act (FECA) may also restrict the ability of § 501(c)(3) organizations to engage in such activity.

Tax Law

The tax laws prohibit § 501(c)(3) organizations from “participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁴ An organization that engages in any amount of campaign activity may lose its § 501(c)(3) status and eligibility to receive tax-deductible contributions. It may also be taxed on its political expenditures,⁵ either in addition to or in lieu of revocation of § 501(c)(3) status.⁶ The tax equals 10% of the expenditures, with an additional tax equal to 100% of the expenditures imposed if the expenditures are not corrected (i.e., recovered and safeguards established to prevent future ones) in a timely manner. The organization's managers may also be subject to tax.⁷ Other consequences for the flagrant violation of the prohibition include the IRS immediately determining and assessing all taxes due and/or seeking injunctive and other relief to enjoin the organization from making additional political expenditures and to preserve its assets.⁸

Legislative History of the Prohibition

The prohibition on campaign intervention was introduced by then-Senator Lyndon Johnson as a floor amendment to the Revenue Act of 1954. He analogized it to the lobbying limitation, enacted

¹ I.R.C. § 501(c)(3) describes organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation ... and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”

² The Internal Revenue Code is Title 26 of the United States Code.

³ See I.R.C. §§ 501(a), 170(c)(2).

⁴ I.R.C. § 501(c)(3). Separate from the campaign intervention prohibition, 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. See *American Campaign Academy v. Comm’r*, 92 T.C. 1053 (1989).

⁵ See I.R.C. § 4955. A similar tax is imposed on the political expenditures of private foundations under § 4945, but it is not assessed if the § 4955 tax is assessed. Private foundations are § 501(c)(3) organizations that receive contributions from limited sources. See I.R.C. § 509.

⁶ See H.R. Rep. 100-391(II), at 1623-24 (1987).

⁷ A tax equal to 2.5% of the expenditures (limited to \$5,000 with respect to any one expenditure) is imposed on the organization's managers who agreed to the expenditures knowing they were political expenditures, unless the agreement is not willful and is due to reasonable cause. Any managers who refuse to correct the expenditures are subject to an additional tax equal to 50% of the expenditures (limited to \$10,000 with respect to any one expenditure).

⁸ See I.R.C. §§ 6852, 7409.

in 1934, under which “no substantial part” of a § 501(c)(3) organization’s activities may be lobbying; however, he mischaracterized the limitation by saying organizations that lobbied were denied tax-exempt status, as opposed to only those that engaged in substantial lobbying.⁹ It appears that the act’s legislative history had no further discussion of the provision. It has been suggested that then-Senator Johnson proposed it either as a way to get back at an organization that supported an opponent or as an alternative to a controversial proposal denying tax-exempt status to organizations making donations to subversive entities and individuals.¹⁰

What is Prohibited Campaign Activity?

Section 501(c)(3) of the Internal Revenue Code prohibits the organizations described therein from “participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office,” but does not further elaborate on the prohibition. Treasury regulations define candidate as “an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.”¹¹ As to what types of activities are prohibited, the regulations add little besides specifying that they include “the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”¹²

Thus, the statute and regulations do not offer much insight as to what activities are prohibited. Clearly, § 501(c)(3) organizations may not do such things as make statements that endorse or oppose a candidate, publish or distribute campaign literature, or make any type of contribution, monetary or otherwise, to a political campaign.

On the other hand, § 501(c)(3) organizations are allowed to conduct activities that are political in nature but are not related to elections, such as lobbying for or against legislation¹³ and supporting or opposing the appointment of individuals to nonelective offices. Additionally, § 501(c)(3) organizations may engage in certain election-related activities so long as the activities do not indicate a preference for or against any candidate. Whether such an activity is campaign intervention depends on the facts and circumstances of each case. The following examples show some of the ways in which the IRS has indicated that an activity might be biased. As will be seen, some biases can be subtle and it is not necessary for the organization to expressly mention a candidate by name.

Voter Guides

Section 501(c)(3) organizations may create and/or distribute voter guides and similar materials that do not indicate a preference towards any candidate. The guide must be unbiased in form, content, and distribution. According to the IRS, there are numerous ways in which a guide may be biased, and the determination will depend on the facts and circumstances of each case. For

⁹ See 100 Cong. Rec. 9,604 (1954) (statement of Sen. Johnson).

¹⁰ See Judith E. Kindell and John Francis Reilly, *Election Year Issues*, IRS 2002 EO CPE Text, 448-51 (2002).

¹¹ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

¹² *Id.*

¹³ However, “no substantial part” of a § 501(c)(3) organization’s activities may be lobbying. For more information, see CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by Erika K. Lunder.

example, a guide could display a bias by not including all candidates on an equal basis. Another way a guide could be biased is by rating candidates, such as evaluating candidates and supporting a slate of the best-qualified candidates, even if the criteria are nonpartisan (e.g., based on professional qualifications).¹⁴ A voter guide could also indicate a bias by comparing the organization's position on issues with those of the candidates.¹⁵ A more subtle way in which a guide may show bias is by only covering issues that are important to the organization, as opposed to covering a range of issues of interest to the general public.¹⁶

Some guides consist of candidate responses to questions provided by the organization. According to the IRS, factors that tend to show these guides are candidate-neutral include the following:

- the questions and descriptions of the issues are clear and unbiased;
- the questions provided to the candidates are identical to those included in the guide;
- the candidates' answers have not been edited;
- the guide puts the questions and appropriate answers in close proximity to each other;
- the candidates are given a reasonable amount of time to respond to the questions; and
- if the candidates are given limited choices for an answer to a question (e.g., yes/no, support/oppose), they are given a reasonable opportunity to explain their positions.¹⁷

Other factors that may be important include the timing of the guide's distribution and to whom it is distributed. For example, the IRS ruled that a § 501(c)(3) organization could include a compilation of Members' voting records on issues important to it and its position on those issues in the edition of its monthly newsletter published after the close of each Congress.¹⁸ The newsletter was sent to the usual small number of subscribers and not targeted to areas where elections were occurring. In this specific situation, the IRS stated that the publication was permissible because it was not timed to an election or broadly distributed.

Conducting Public Forums

Section 501(c)(3) organizations may conduct unbiased and nonpartisan public forums where candidates speak or debate. According to the IRS, factors that tend to show a public forum is unbiased and nonpartisan include the following:

- all legally qualified candidates are invited;
- the questions are prepared and presented by a nonpartisan independent panel;

¹⁴ See *Ass'n of the Bar of the City of New York v. Comm'r*, 858 F.2d 876 (2d Cir. 1988); Rev. Rul. 67-71, 1967-1 C.B. 125.

¹⁵ See IRS FS-2006-17 (Feb. 2006).

¹⁶ See Rev. Rul. 78-248, 1978-1 C.B. 154.

¹⁷ See IRS FS-2006-17 (Feb. 2006); Rev. Rul. 78-248, 1978-1 C.B. 154.

¹⁸ See Rev. Rul. 80-282, 1980-2 C.B. 178.

- the topics and questions cover a broad range of issues of interest to the public;
- all candidates receive an equal opportunity to present their views; and
- the moderator does not comment on the questions or imply approval or disapproval of the candidates.¹⁹

Inviting Candidates to Speak

A § 501(c)(3) organization may invite a candidate to speak at its functions without it being prohibited campaign activity. According to the IRS, factors that tend to indicate the event was permissible include the organization provided an equal opportunity to speak at similar events to the other candidates; the organization did not indicate a preference for or against any candidate; and no fund-raising occurred at the event.²⁰ Section 501(c)(3) organizations may also invite candidates to speak in their non-candidate capacity.²¹ Factors indicating that no campaign intervention occurred include (1) the individual was chosen to speak solely for non-candidacy reasons; (2) the individual spoke only in his or her non-candidate capacity; (3) no reference to the upcoming election was made; (4) no campaign activity occurred in connection with the individual's attendance; (5) the organization maintained a nonpartisan atmosphere at the event; and (6) the organization's communications announcing the event clearly indicated the non-candidate capacity in which the individual was appearing and did not mention the individual's candidacy or the election.²²

Voter Registration

Section 501(c)(3) organizations may conduct nonpartisan voter registration and get-out-the-vote drives.²³ Again, the activities may not indicate a preference for any candidate or party. According to the IRS, factors indicating that these activities are neutral include the following:

- candidates are named or depicted on an equal basis;
- no political party is named except for purposes of identifying the party affiliation of each candidate;
- the activity is limited to urging individuals to register and vote and to describing the time and place for these activities; and
- all services are made available without regard to the voter's political preference.²⁴

Issue Advocacy

Section 501(c)(3) organizations may take positions on policy issues. Because there is no rule that campaign activity occurs only when an organization expressly advocates for or against a

¹⁹ See Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 2007-41, 2007-1 C.B. 1421.

²⁰ See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

²¹ See *id.*

²² See *id.*

²³ See *id.* Private foundations making expenditures for these activities may be subject to tax. See I.R.C. § 4945.

²⁴ See 2002 EO CPE Text, *supra* note 10, at 379.

candidate,²⁵ the line between issue advocacy and campaign activity can be difficult to discern. According to the IRS, key factors that indicate an issue advocacy communication does not cross the line into campaign intervention include the following:

- the communication does not identify any candidates for a given public office, whether by name or other means, such as party affiliation or distinctive features of a candidate's platform;
- the communication does not express approval or disapproval for any candidate's positions and/or actions;
- the communication is not delivered close in time to an election;
- the communication does not refer to voting or an election;
- the issue addressed in the communication has not been raised as an issue distinguishing the candidates;
- the communication is part of an ongoing series by the organization on the same issue and the series is not timed to an election; and
- the identification of the candidate and the communication's timing are related to a non-electoral event (e.g., a scheduled vote on legislation by an officeholder who is also a candidate).²⁶

Selling Mailing Lists and Other Business Activities

Under certain circumstances, § 501(c)(3) organizations may sell or rent goods, services, and facilities to political campaigns. This includes selling and renting mailing lists and accepting paid political advertising. According to the IRS, factors that tend to indicate the activity is not biased towards any candidate or party include the following:

- the selling or renting activity is an ongoing business activity of the organization;
- the goods, services, and facilities are available to the general public;
- the fees charged are the organization's customary and usual rates; and
- the goods, services, or facilities are available to all candidates on an equal basis.²⁷

Website Links

A § 501(c)(3) organization could engage in campaign activity by linking its website to another website that has content showing a preference for or against a candidate.²⁸ Whether the linking is

²⁵ See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

²⁶ See *id.*; see also 2002 EO CPE Text, *supra* note 10, at 376-77. But note, depending on timing, such a communication might trigger regulation under FECA, discussed in the "Campaign Finance Law" section, *infra*.

²⁷ See Rev. Rul. 2007-41, 2007-1 C.B. 1421; see also, 2002 EO CPE Text, *supra* note 10, at 383-84.

²⁸ See Rev. Rul. 2007-41, 2007-1 C.B. 1421. Due to possible constitutional concerns stemming from the Supreme Court's decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the IRS indicated that it would not pursue cases involving a link between the website of a § 501(c)(3) organization and the home page of a related § 501(c)(4) organization. See *Memorandum For All Revenue Agents*, from Marsha A. Ramirez, Director, Exempt Organizations, Examinations, dated July 28, 2008, available at <http://www.irs.gov/pub/irs-tege/> (continued...)

campaign intervention depends on the facts and circumstances of each case. Factors the IRS will look at include the context of the link on the organization's website, whether all candidates are represented, whether the linking serves the organization's exempt purpose, and the directness between the organization's website and the page at the other site with the biased material.²⁹

Activities of the Organization's Leaders and Members

Members, managers, leaders, and directors of § 501(c)(3) organizations may participate in campaign activity in their private capacity. The organization can not support the activity in any way.³⁰ For example, these individuals may not express political views in the organization's publications or at its functions (this is true even if the individual pays the costs associated with the statement),³¹ and the organization may not pay expenses incurred by the individual in making the political statement. Individuals may be identified as being associated with an organization, but there should be no intimation that their views represent those of the organization.³²

IRS Political Activity Compliance Initiative

There has been ongoing congressional, IRS, and public concern about violations of the campaign intervention prohibition by § 501(c)(3) organizations. These concerns led the IRS to develop the Political Activity Compliance Initiative.³³ It has two parts: the IRS performed educational outreach to § 501(c)(3) organizations about the prohibition and used a fast-track process for reviewing possible violations. The initiative was used during the 2004, 2006, and 2008 election cycles. It does not appear the IRS has publicly indicated whether it will be used during the 2010 election cycle.

The 2004 initiative involved the expedited review of 110 cases in which § 501(c)(3) organizations were alleged to have violated the campaign intervention prohibition. The IRS issued a written advisory in 69 of these cases, which meant that the agency determined the organization engaged in campaign activity but mitigating factors led to the organization not being penalized. Mitigating factors included that the activity was of a one-time nature or shown to be an anomaly, the activity was done in good faith reliance on advice of counsel, or the organization corrected the conduct (e.g., recovered any funds that were spent) and established safeguards to prevent future violations. The IRS revoked the tax-exempt status of five organizations (one for issues not related to campaign activity) and proposed two more revocations. The IRS did not find substantiated campaign activity in 23 of the cases, and found non-political violations of the tax laws in six other cases. The remaining five cases were still open as of the last IRS update in 2007.

While the 2004 initiative was proceeding, there were reports in various media outlets that raised the question of whether the IRS had been politically motivated in investigating the § 501(c)(3)

(...continued)

internetfielddirective072808.pdf.

²⁹ See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

³⁰ See *id.*; see also 2002 EO CPE Text, *supra* note 10, at 363-65.

³¹ See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

³² See *id.*

³³ The 2004 report is available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf. The 2006 report, which includes updated 2004 statistics, is available at http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

organizations so close to the 2004 election.³⁴ In response, the IRS Commissioner asked the Treasury Inspector General for Tax Administration (TIGTA) to investigate whether the IRS had engaged in any improper activities while conducting the project. In 2005, TIGTA released its report, which concluded that the IRS had used appropriate, consistent procedures during the initiative.³⁵

The 2006 initiative involved 100 cases selected for examination. As of the last IRS update in 2007, 60 of these cases remained open. In the 40 closed cases, the IRS issued written advisories in 26 of them, and did not find substantiated political intervention in the other 14 cases. The IRS also identified 269 instances of § 501(c)(3) groups apparently making direct contributions to political candidates. The 2008 data have not yet been released.

Campaign Finance Law

The Federal Election Campaign Act (FECA),³⁶ which regulates the raising and spending of campaign funds, is separate and distinct from the tax code. FECA prohibits corporations from using general treasury funds to make contributions in connection with federal elections.³⁷ While FECA does not prohibit unincorporated § 501(c)(3) organizations from making such contributions, the IRC prohibits all § 501(c)(3) organizations, regardless of corporate status, from making such contributions, as discussed above.

In its recent ruling in *Citizens United v. FEC*,³⁸ the Supreme Court invalidated the prohibitions in FECA on corporations and labor unions using their general treasury funds to make “independent expenditures,” which are communications “expressly advocating the election or defeat of a clearly identified candidate” that are not coordinated with any candidate or party,³⁹ and “electioneering communications,” which are broadcast, cable or satellite transmissions that refer to a clearly identified federal candidate and aired within 60 days of a general election or 30 days of a primary.⁴⁰ The Court determined that these prohibitions constitute a “ban on speech” in violation of the First Amendment.⁴¹ Due to the tax code prohibition discussed above, § 501(c)(3) organizations are generally not permitted to engage in the activities regulated by FECA, and thus the *Citizens United* decision does not appear to impact them in a significant manner.

At the same time, the activities that constitute electioneering under the IRC and FECA are not necessarily identical. For example, it appears possible that an issue advocacy communication, depending on its timing and content, might be an electioneering communication under FECA, but

³⁴ See, e.g., Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST (Oct. 29, 2004); Vincent J. Schodolski, *Political sermons stir up the IRS: Effort to enforce tax-exempt rules or bid to bully pulpits?* CHI. TRIB. (Nov. 20, 2005).

³⁵ TIGTA Report 2005-10-035 (Feb. 2005).

³⁶ 2 U.S.C. § 431 *et seq.*

³⁷ 2 U.S.C. § 441b(a).

³⁸ 130 S. Ct. 876 (2010). For an analysis of this case, 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.

³⁹ 2 U.S.C. § 431(17).

⁴⁰ 2 U.S.C. § 434(f)(3).

⁴¹ See *Citizens United*, 130 S. Ct. at 898.

might not be treated as campaign intervention under the IRC.⁴² Such a communication would need to comply with FECA, such as its disclosure requirement for electioneering communications meeting certain monetary thresholds, if applicable.⁴³

Selected Legislation: The DISCLOSE Act

In the 111th Congress, numerous bills have been introduced in response to the *Citizens United* decision.⁴⁴ In general, it appears the bills would minimally impact the activities of § 501(c)(3) organizations since these groups are already generally prohibited under the IRC from engaging in the types of activities regulated by the bills. However, it is possible, as discussed above, that a narrow range of activity regulated under federal campaign finance law might be permissible under the IRC prohibition (e.g., issue advocacy communications that fall within the definition of “electioneering communication”). If so, legislation attempting to regulate these types of activities might affect § 501(c)(3) organizations.

The legislation that has received the most attention to date, the DISCLOSE Act,⁴⁵ would expressly exclude § 501(c)(3) organizations from the act’s disclosure and disclaimer provisions that would otherwise apply to “covered organizations” making certain “independent expenditures” and electioneering communications,” as defined under the act.⁴⁶ While H.R. 5175 as introduced did not provide an exemption for § 501(c)(3) organizations, it was subsequently amended to do so. The House passed the amended version of the bill on June 24, 2010, by a 219-206 vote. A Senate companion bill, S. 3628, contains a similar exemption. The Senate rejected cloture on this bill on July 27, 2010, by a 57-41 vote. Another version of the act, S. 3295, which S. 3628 is apparently intended to supercede, does not include the exemption.

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⁴² See Rev. Rul. 2004-6; 2004-1 C.B. 328.

⁴³ 2 U.S.C. § 434.

⁴⁴ For discussion and analysis of legislative options available to Congress after *Citizens United*, see CRS Report R41054, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress*, by R. Sam Garrett; CRS Report R41096, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues*, by L. Paige Whitaker et al.

⁴⁵ DISCLOSE is an acronym for “Democracy is Strengthened by Casting Light on Spending in Elections.” For analysis of the DISCLOSE Act, see CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder.

⁴⁶ H.R. 5175, §§ 211-214, 301; S. 3295, §§ 211-214, 301. Under both bills, the term “covered organization” would be defined as corporations (other than § 501(c)(3) organizations), labor unions, certain § 501(c)(4) organizations, § 501(c)(5) and (c)(6) organizations, and § 527 political organizations that are not political committees. Many § 501(c)(3) organizations are incorporated and therefore would fall within the definition of “covered organizations” as corporations, absent an exemption.