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

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October 21, 2010

Congressional Research Service
7-5700
www.crs.gov
R40183

CRS Report for Congress
Prepared for Members and Committees of Congress
c11173008

Summary

In the 2010 midterm election cycle, tax-exempt § 501(c)(4) social welfare organizations are reportedly spending millions of dollars in an attempt to influence the elections. These organizations are permitted to engage in campaign activity under federal law, subject to regulation under both the Internal Revenue Code (IRC) and the Federal Election Campaign Act (FECA).

Some had predicted that § 501(c)(4) groups would be more active in this election cycle than in past ones because of the Supreme Court's recent decision in *Citizens United v. FEC*. In that case, the Court invalidated long-standing prohibitions in FECA on corporations and labor unions using their general treasury funds to make independent expenditures and electioneering communications. Since many § 501(c)(4) organizations are incorporated, they had been subject to these prohibitions unless qualifying for an exception. In addition, 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 pay for independent expenditures and electioneering communications. In the 2010 election cycle, § 501(c)(4) organizations are among the entities operating with less restriction due to the Supreme Court's recent ruling in *Citizens United v. FEC*.

At the same time, it is important to realize that § 501(c)(4) social welfare organizations are still subject to regulation under FECA and the IRC. For example, under FECA, incorporated § 501(c)(4) organizations are prohibited from making political contributions and would still be required to establish a political action committee (PAC) in order to do so. One requirement under the IRC is that the organization must have the promotion of social welfare as its primary activity. Thus, a group that wants to maintain its § 501(c)(4) status cannot have campaign activity (along with any other activity that does not serve its exempt purpose) as its primary activity. Furthermore, § 501(c)(4) organizations engaging in campaign-related activities may be required to report information to the Federal Election Commission (FEC) and the Internal Revenue Service (IRS).

In the 111th Congress, numerous bills have been introduced responding to the *Citizens United* decision. Many would affect § 501(c)(4) organizations. For example, the primary legislative response to *Citizens United*, the DISCLOSE Act (H.R. 5175, as passed by the House, and S. 3628) would generally subject § 501(c)(4) organizations to the act's disclosure and disclaimer provisions, although there would be an exception for qualifying large groups.

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The tax-exempt social welfare organizations described in § 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]

In the 2010 election cycle, § 501(c)(4) organizations are among the entities operating with less restriction due to the Supreme Court's recent 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, which are communications "expressly advocating the election or defeat of a clearly identified candidate" that are not coordinated with any candidate or party,[5] and electioneering communications, which are broadcast, cable, or satellite transmissions that refer to a clearly identified federal candidate and are aired within 60 days of a general election or 30 days of a primary.[6] The Court determined that these prohibitions constitute a "ban on speech" in violation of the First Amendment.[7]

These FECA prohibitions had affected § 501(c)(4) organizations in two ways. First, many § 501(c)(4) organizations 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.[8] 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 the ability of these groups to engage in campaign activity under both FECA and the IRC. These are discussed below.

[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." The I.R.C. is found in Title 26 of the U.S. Code.

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

[3] 2 U.S.C. § 431 *et seq.*

[4] 130 S. Ct. 876 (2010). For 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.

[5] 2 U.S.C. § 431(17).

[6] 2 U.S.C. § 434(f)(3).

[7] *See Citizens United*, 130 S. Ct. at 898.

[8] An exception existed for qualified nonprofit corporations, which are defined as a § 501(c)(4) corporation meeting the following criteria: (1) its only express purposes is the promotion of political ideas; (2) it does not engage in business activities; (3) it has no shareholders or other persons with an ownership interest or claim on its assets or who received any benefit from the corporation that is a disincentive for them to disassociate themselves from the corporation's position on a political issue; and (4) it is not established by and does not accept donations from business corporations. 11 C.F.R. § 114.10(c). The criteria are based on the ruling in *FEC v. Massachusetts Citizens for Life, Inc., (MCFL)*, 479 U.S. 238 (1986), in which the Supreme Court held that the FECA prohibition on corporations using their treasury funds to make independent expenditures could not constitutionally be applied to certain non-profit corporations. 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.

Prohibition on 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.[9] That prohibition remains in effect. FECA defines a contribution to include "anything of value" that is given, made available or rendered to a candidate or political committee.[10] In contrast, an independent expenditure is defined to include "anything of value" that is spent to expressly 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.[11] 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 Political Action Committee (PAC)—and may use such PAC funds for contributions.[12]

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

Section 501(c)(4) organizations must comply with requirements in the IRC in order to maintain their tax-exempt status. For those choosing to engage in campaign activity, two requirements stand out: (1) campaign activity (along with any other activities that do not further an exempt purpose) cannot be the organization's primary activity; and (2) the organization must primarily benefit public interests.

Primary Activity Must Be Promotion of Social Welfare

While § 501(c)(4) social welfare organizations may engage in campaign activity under the tax code,[13] a Treasury regulation states that "[t]he 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."[14] Therefore, because a § 501(c)(4) organization's primary activity

[9] 2 U.S.C. § 441b(a).

[10] 2 U.S.C. § 431(8).

[11] 2 U.S.C. § 431(17).

[12] *See* 2 U.S.C. § 441(b)(B)(2)(C).

[13] *Compare* I.R.C. § 501(c)(4) (containing no statement prohibiting the campaign activities of the organizations described therein), *with* I.R.C. § 501(c)(3) (prohibiting the charitable organizations described therein 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").

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

must be promoting social welfare, campaign activity (and any other activities that do not further an exempt purpose) cannot be its primary activity.[15]

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.[16] There are three basic issues: (1) what is considered campaign activity; (2) what is the threshold for determining whether an activity is the organization's primary activity; and (3) how are the organization's activities to be measured.

With respect to the first issue, the tax code and regulations do not provide much insight into what constitutes campaign activity. Nearly identical campaign intervention language as in the Treasury regulation is found in IRC § 501(c)(3),[17] and guidance interpreting that language is helpful in the § 501(c)(4) context. However, in both cases, there is still a gray area where it can be difficult to determine whether an activity has crossed the line into campaign intervention. This is because there are many activities that are political in nature (e.g., issue advocacy, distributing voter guides, and conducting get-out-the-vote drives) that are not considered to be campaign intervention so long as they do not show a preference for or against a candidate.[18] The line between campaign activity and these other political activities can be faint since preferences can be subtle and there is no requirement that the organization expressly advocate for the election or defeat of the candidate.[19] Whether an activity is campaign intervention will depend on the facts and circumstances of each case.

Similarly, there is little guidance with respect to the second and third issues. Regarding the threshold for determining whether campaign activity (along with any other non-exempt purpose activity) is the organization's primary activity, some have suggested that primary simply means more than 50%,[20] while others have called for a more stringent standard.[21] The third issue raises

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[15] *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).

[16] Because of these ambiguities, the argument has been made that the campaign intervention standard for § 501(c)(4) organizations is unconstitutionally vague. *See 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.

[17] I.R.C. § 501(c)(3) prohibits the charitable organizations described therein 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."

[18] *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 fall within the category of impermissible campaign intervention for § 501(c)(3) organizations).

[19] 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.

[20] *See Task Force Comments*, *supra* note 16 at 39 ("Many practitioners believe that 'less than primary' means less than 50% of an organization's expenditures in a year.").

[21] *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) (advocating for a standard that requires a § 501(c)(4) organization's campaign activity, along with any other non-exempt purpose activities, be insubstantial); *see also Task Force Comments*, *supra* note 16, at (continued...)

the question of what factors should be included in the analysis when measuring the organization's campaign activities. For example, campaign activity could be measured solely by expenditures[22] 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.[23]

It seems that the determination of whether an organization has violated its tax-exempt status by engaging in too much campaign activity is made by examining its activities during the entire year. In such case, it would not seem possible to determine whether an organization should have its § 501(c)(4) status revoked by looking solely at its activities during the period immediately prior to an election.

Restriction on Serving Private Interests

Because an organization must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community," it cannot qualify for § 501(c)(4) status if it primarily serves a private benefit. Thus, it appears an organization that primarily benefits partisan interests might jeopardize its § 501(c)(4) status.[24]

This was the issue in a 2008 case, *Democratic Leadership Council v. United States*, although the court did not ultimately decide the case on its merits.[25] The case dealt with the IRS's retroactive revocation of the group's § 501(c)(4) status after the agency determined that the group had impermissibly benefited private interests, specifically Democratic elected officials. The court ruled that the revocation was improper based on its determination that a Treasury regulation only permitted retroactive revocation under certain circumstances (e.g., if the organization had omitted a material fact on its application for tax-exempt status), none of which were present in the case. The court did not determine whether the group qualified for § 501(c)(4) status and noted that the IRS was not barred from prospectively revoking an organization's tax-exempt 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.[26]

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44-51 (proposing a bright-line safe harbor so that an organization would not lose its § 501(c)(4) status due to excessive political activities so long as its political activity expenditures did not exceed 40% of its total program expenditures; in the absence of a safe harbor, the commentators suggested using the 40% rule to create a rebuttable presumption that an organization qualified for § 501(c)(4) status and was not a § 527 political organization).

[22] *See Task Force Comments, supra* note 16, at 43-51 (suggesting that political expenditures be the sole measure).

[23] *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").

[24] *See* 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).

[25] 542 F. Supp. 2d 63 (D.D.C. 2008).

[26] *See, e.g.*, Letter from Robert F. Bauer, General Counsel, Obama for America to John C. Keeney, Deputy Assistant (continued...)

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.[27]

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"[28] whose major purpose is to elect federal candidates to office. FECA further defines "contribution"[29] and "expenditure"[30] as monies or anything of value "for the purpose of influencing any election for Federal office." 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.[31]

In its landmark 1976 decision *Buckley v. Valeo*,[32] 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").[33] 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."[34] 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."[35]

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 to what groups it applies, are at the heart of a debate concerning the circumstances under which

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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).

[27] 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).

[28] 2 U.S.C. § 431(4)(A).

[29] 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).

[30] 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).

[31] 2 U.S.C. §§ 432-437.

[32] 424 U.S. 1 (1976).

[33] *Id.* at 44, no. 52.

[34] *Id.* at 79.

[35] *See* 2 U.S.C. § 431(4)(A).

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 in order for regulation as a political committee to be triggered. For example, some would maintain that it is unlikely that any IRC-compliant § 501(c)(4) organization could 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 the nomination and election of a candidate. Others, however, would 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 that would 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 it is relevant to examine an organization's activities beyond express advocacy to ascertain 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.[36]

Potential Tax Consequences

There may be tax consequences to a § 501(c)(4) organization for engaging in campaign activity or to its donors for making contributions. For some organizations or donors, these taxes might serve as a disincentive to engage in the taxable activity.

Tax on Political Expenditures

Even though § 501(c)(4) organizations may engage in campaign activity under the IRC, they are subject to tax if they make an expenditure for a § 527 "exempt function."[37] An "exempt function" is the "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."[38]

[36] *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).

[37] I.R.C. § 527(f).

[38] I.R.C. § 527(e)(2).

The tax is imposed at the highest corporate rate on the lesser of the organization's net investment income or the total amount of "exempt function" expenditures.[39] Thus, 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 directly engage in the activities giving rise to the taxable expenditures. Section 501(c)(4) organizations may lawfully avoid the tax by setting up a separate segregated fund under § 527(f)(3) to conduct the taxable political activities. The fund will be treated as a separate § 527 political organization and be subject to applicable tax and campaign finance laws.[40]

Applicability of Gift Tax

It is not entirely clear whether contributions to § 501(c)(4) organizations are subject to the federal gift tax, which is imposed on an individual's lifetime gifts of property.[41] 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 (which is $13,000 per donee for 2010).[42]

There is no statutory provision that exempts contributions to § 501(c)(4) organizations from the gift tax, thus suggesting the contributions may be subject to the tax.[43] The IRS appears to take the position that donations to § 501(c)(4) organizations are subject to the gift tax,[44] although it is not clear the extent to which the agency enforces it.[45]

It has been suggested that applying the gift tax to donations made to advocacy organizations could violate the donor's First Amendment rights and raise equal protection concerns due to the favorable treatment afforded donations made to other types of tax-exempt organizations.[46] It does not appear any court has examined these arguments.

[39] I.R.C. § 527(f).

[40] For information on § 527 organizations, *see* CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder; CRS Report RS21716, *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika K. Lunder.

[41] I.R.C. § 2501. Donors are permitted to give up to $1,000,000 in tax-free gifts during their lifetime, although this may have estate tax consequences. For information on the gift tax, *see* CRS Report 95-416, *Federal Estate, Gift, and Generation-Skipping Taxes: A Description of Current Law*, by John R. Luckey.

[42] I.R.C. § 2503(b); Rev. Proc. 2009-50; 2009-2 C.B. 617.

[43] *Cf.* I.R.C. § 2501(a)(4) (excluding donations to § 527 political organizations from the gift tax); I.R.C. § 2522 (providing a deduction from taxable gifts for qualifying donations to charitable organizations, fraternal societies, and veterans organizations).

[44] *See* Rev. Rul. 82-216, 1982-2 C.B. 220 ("The Service continues to maintain that gratuitous transfers to persons other than [§ 527 political organizations] are subject to the gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor's own social, political or charitable goals.").

[45] *See Task Force Comments*, *supra* note 16, at 13. ("There have been no public indications of IRS enforcement of gift tax on donations to § 501(c)(4) entities for at least a decade, even in the obvious cases where individual donors have made very large, publicly disclosed contributions to § 501(c)(4) organizations, such as ballot measure committees.").

[46] *See* Barbara K. Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 164 (2004).

Reporting Requirements

Under the IRC, tax-exempt organizations, including § 501(c)(4) organizations, are generally required to file an annual information return (Form 990) with the IRS.[47] Filing organizations are required to report information regarding their political activities on the new Schedule C.[48] 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 § 527 exempt function activities; (4) report the amount of funds contributed to other organizations for § 527 exempt function activities; (5) report whether a Form 1120-POL (the tax return filed by organizations owing the § 527 tax) was filed for the year; and (6) report the name, address, and employer identification number of every § 527 political organization to which a payment was made and the amount of such payments, and indicate whether the amounts were paid from internal funds or were contributions received and directly transferred to a separate political organization.

Section 501(c)(4) organizations report the names and addresses of donors who contributed at least $5,000 during the year on a different schedule to the Form 990, Schedule B. These are all contributors, 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.[49] However, any identifying information of the contributors listed on Schedule B is not subject to disclosure.

Under FECA, corporations—including incorporated § 501(c)(4) organizations—are required to report their spending for political advertising to the FEC if a communication meets certain definitions and monetary thresholds.[50] Generally, corporations making independent expenditures aggregating over $250 during a calendar year must disclose whether an independent expenditure supports or opposes a candidate, whether it was made independently of a campaign, and the identity of certain donors who contributed "for the purpose of furthering" the independent expenditure.[51]

With regard to electioneering communications, FECA requires corporations making disbursements aggregating over $10,000 during a calendar year to disclose certain information 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

[47] *See* I.R.C. § 6033.

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

[49] I.R.C. § 6104(b) and (d).

[50] The Court in *Citizens United* upheld the disclaimer (which is sponsor information included within a communication) and disclosure requirements for electioneering communications as applied to the film and related advertisements that Citizens United had produced. According to the Court, while they may burden the ability to speak, disclaimer and disclosure requirements "impose no ceiling on campaign-related activities" and do not "prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (*quoting* Buckley v. Valeo, 424 U.S. 1, 64 (1976) and McConnell v. FEC, 540 U.S. 93, 201 (2003)).

[51] 2 U.S.C. § 434(c).

communication.[52] Such corporations must also disclose donors who contribute at least $1,000; however, if the disbursement is made from a separate bank account that contains only donations from U.S. citizens and legal resident aliens made directly to the account for electioneering communications, then only the identities of donors who contributed at least $1,000 to that account are required to be disclosed.[53] This information is made publicly available.

Notably, FEC regulations further provide that corporations—which would include incorporated § 501(c)(4) organizations—making disbursements for electioneering communications only have to disclose the identity of each person who made a donation of at least $1,000 *"for the purpose of furthering"* the electioneering communication.[54] In light of *Citizens United*, however, the applicability of this regulation is unclear.[55]

Finally, if the § 501(c)(4) organization has established a separate segregated fund, then that fund is subject to separate reporting requirements. It will generally be required to periodically disclose detailed information on its contributors (including their identities) and expenditures to either the FEC or the IRS,[56] depending on whether it is a political committee for purposes of the FECA.[57] These reports are publicly available.

Selected Legislation: DISCLOSE Act

In the 111th Congress, numerous bills have been introduced in response to the *Citizens United* decision.[58] The legislation that has received the most attention to date, the DISCLOSE Act,[59] would impose additional disclosure and disclaimer requirements on "covered organizations" making certain "independent expenditures" and "electioneering communications," as defined under the act.[60] The term "covered organization" would include § 501(c)(4) organizations, with an exception for any § 501(c)(4) organization meeting the following criteria:

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[52] 2 U.S.C. § 434(f).

[53] 2 U.S.C. § 434(f)(2)(E), (F).

[54] 11 C.F.R. § 104.20.

[55] This regulation was promulgated in response to the Supreme Court's ruling in *FEC v. Wisconsin Right to Life, Inc.*, and prior to its ruling in *Citizens United*.

[56] For information on these reporting requirements, *see* CRS Report RS20918, *527 Organizations and Campaign Activity: Timing of Reporting Requirements under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker; and CRS Report RS21716, *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika K. Lunder.

[57] There has been significant controversy over the extent to which some § 527 political organizations are political committees for purposes of FECA. For more information, *see* CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder.

[58] 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.

[59] 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.

[60] 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.

- the organization had § 501(c)(4) status during the 10 previous years;
- the organization had at least 500,000 dues-paying members who were individuals during the prior year, with at least one member from each of the 50 states, the District of Columbia, and Puerto Rico;
- no more than 15% of the organization's total funds were from corporate or labor union donations during the prior year; and
- the organization did not use funds from corporations or labor unions for campaign-related activity.

The version of the act that was passed by the House, H.R. 5175, on June 24, 2010, by a 219-206 vote, includes this exemption. The Senate rejected cloture on a companion bill, S. 3628, that also includes the exemption, on July 27, 2010, by a 57-41 vote, and again on September 23, 2010, by a 59-39 vote. Another version of the act, S. 3295, which S. 3628 is apparently intended to supercede, does not include the exemption.

It is not possible to identify the groups that would qualify for this exception because the information necessary to make the determination does not appear to be reported. For example, although § 501(c)(4) organizations are generally required to file an annual information return (Form 990) with the IRS, the return does not ask about the number of dues-paying members or where they live. A further complication that might arise in attempting to identify the qualifying organizations is the imprecise concept of membership in the § 501(c)(4) context, as it does not appear there are uniform standards for determining what constitutes membership under the DISCLOSE Act or existing federal law. At this time, it appears the only way to determine which organizations would qualify for the exemption is to look for those that self-identify or are reported by the media as qualifying. According to news reports, § 501(c)(4) organizations that may meet the criteria include the National Rifle Association, Sierra Club, and the AARP.[61]

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[61] *See* Gail Russell, *Did Democrats' deal with the NRA kill campaign finance reform?* THE CHRISTIAN SCIENCE MONITOR, June 18, 2010; *House OKs campaign disclosure legislation*, CHATTANOOGA TIMES FREE PRESS, June 25, 2010.