Nonprofits May Benefit from New FEC Membership Regulations

Nonprofit membership organizations that are active in federal elections, such as many 501(c)(4) organizations and trade associations, are acutely aware that the federal restrictions on PAC fundraising and spending can greatly limit an organization’s effectiveness. Interpretation and enforcement of the Federal Election Commission regulations on membership organizations are often key to a PAC’s success [NN, 2/99, p.1]. The newly revised regulations may make it easier for many nonprofits to raise PAC money and to more widely disseminate express advocacy messages. 501(c)(3) organizations are prohibited from intervening in elections (federal or otherwise).

For nonprofit organizations with connected PACs, the FEC’s membership rules are critical because they determine who the PAC may solicit for contributions. The smaller an organization’s membership, the more difficulty it will have raising PAC money. This naturally has a direct impact on how much money the PAC will be able to spend to influence federal elections.

The membership rules are also important because federal election law allows nonprofit membership organizations to spend non-PAC money to communicate express advocacy messages to its own members. For instance, a 501(c)(4) membership organization may use 501(c)(4) funds to tell its members to “Vote for Jane Doe.” Because it is easier to raise (c)(4) money than it is to raise PAC funds, strategic use of this provision of the law can help maximize the effective use of scarce PAC dollars.

Of particular interest to organizations with national federation or affiliate structures should be the provision allowing members of each affiliated entity to disseminate express advocacy messages to one another’s members. For example, if a national organization has an affiliate in state X, the members of the affiliate will be considered members of the national organization so long as the members of the affiliate meet the FEC’s definition of members. Therefore, so long as members of the affiliate pay annual dues to the affiliate, the national organization can communicate “Vote for Jane Doe” messages to the affiliate members. The FEC will apply a broad variety of factors to determine whether two organizations are affiliated for the purposes of these rules.

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Voter Guides Allowed, Coordination Clarified

Despite procedural behavior the Court called “reprehensible,” the Christian Coalition recently scored a major victory in its ongoing struggle with the Federal Election Commission. Judge Joyce Hens Green of the US District Court for the District of Columbia ruled for the Coalition on seven of nine FEC complaints about the way the Coalition behaved itself in several elections in the early ’90s.

The court first examined the Commission’s claims that the Coalition had paid for communications that violated the prohibition on express advocacy by most corporations. The court applied a definition of express advocacy that looked slightly beyond the laundry list of “magic words” set out in the landmark case Buckley v. Valeo. Still, except for one instance involving a thinly veiled exhortation to vote for Newt Gingrich, Judge Green decided that the Coalition had been careful enough to avoid crossing the linguistic line into express advocacy of the election or defeat of any clearly identified candidate.

Next, the court addressed the FEC’s more interesting claims, that Coalition communications that did not contain express advocacy were nonetheless prohibited. This was the first major case testing the Commission’s theory that such communications may be transformed into contributions because of coordination with candidates. While the court agreed that this could theoretically happen, the ruling substantially raises the bar for the FEC to prove coordination took place.

In several instances, the Coalition advised particular campaigns when and to whom it was making telephone pitches and distributing its voter guides; met with candidates to discuss issues which were later included in the guides; suggested language that should be used in answering the guide questionnaires; and sought and received non-public campaign information and strategy. The FEC certainly believed it had the case in the bag with its “insider trading” analogy. The Coalition, the Commission argued, armed with its insider knowledge and access to the candidates could take on some campaign burdens, such as targeting specific constituencies, in exchange for special consideration of its interests.

Judge Green held that the First Amendment prohibits such an imaginative approach. She noted that the FEC’s interpretation of the law failed to account for legal lobbying efforts about issues of concern to a corporation or union. When the distinction between a discussion of issues and a discussion of campaign strategies is blurred, the court held, this is especially important. Additionally, “expressive coordinated expenditures” (coordinated communications reflective of the views of the spender) contain, by their very nature, highly-valued, constitutionally-protected political speech.

To resolve those twin issues, the court established that, in the absence of a suggestion or request by a campaign for an expenditure by the corporation, the FEC must prove “substantial discussion or negotiation between the campaign and the spender over a communication’s: 1) contents, 2) timing, 3) location, mode or intended audience, or 4) volume.” The key term is “discussion or

The ruling substantially raises the bar for the FEC to prove coordination took place.

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Can I Have Your Number?
The FEC’s Best Efforts Requirements Prove Onerous for Some PACs

As the Friends of Jack Metcalf found out this spring, the FEC isn’t bluffing when it demands that political committees make “best efforts” to obtain a contributor’s full name, mailing address, occupation, and name of employer.

Embarrassingly, even the committee’s treasurer neglected to provide his own employment data, causing the FEC’s General Counsel to speculate that the committee’s disregard for the law rose to the level of being knowing and willful.

Not surprisingly, the Metcalf committee’s plight is far from uncommon. The Federal Election Campaign Act’s reporting requirements are not particularly liked by contributors, who are reluctant to pass on such personal information, nor by the committees, who are even less enamored of the inevitable watchdog groups’ much-publicized analyses of the data. For instance, the National Rifle Association Victory Fund reported less than 50 percent of its contributors’ personal information for its 1998 year-end report (and received a chiding letter from the FEC about it). The National Organization of Women PAC did remarkably better, but only after a 55 percent showing in 1997 (and its own warning letter).

Anticipating resistance to compliance, the

Christian Coalition, cont.

Continued from previous page

Christian Coalition’s actions during the campaigns demonstrated a reckless disregard for caution, while its actions during the litigation bordered on contempt. Yet the organization still prevailed on nearly every count. In light of this, nonprofits undertaking independent expenditures or other election-related activities may want to re-evaluate their procedures for preventing the appearance of coordination with campaigns. A few caveats remain. While the Commission has waived its right to a fast appeal — and this well-reasoned case will no doubt be accorded considerable respect by other courts — the ruling controls only for the District of Columbia and only for now. A final resolution to the issue will have to await ultimate appeals, further litigation, or even the holy grail of campaign finance reform.
Final(ly) Regulations Issued on COBRA Coverage

Nonprofit organizations sponsoring employee health insurance programs should be aware of their responsibilities under the recently-finalized Consolidated Omnibus Budget Reconciliation Act [COBRA] regulations. They should also be aware that new proposed regulations have been released.

Organizations that chose to comply with the initial regulations will find it easy to meet these new obligations.

COBRA requires employers who provide group health plans for their employees to offer continued group coverage for a set period of time after the employment relationship ends (either through termination or due to certain other “qualifying events”). The employer is also obligated to continue coverage which had been given to dependents of the former employee.

The new rules apply on the first day of any plan year beginning on or after January 1, 2000. Those organizations that chose to comply with the regulations as proposed in 1987 should find it easy to meet these new obligations.

The Small-Employer Plan Exception

COBRA does not apply to employers that normally employ fewer than 20 employees, thus exempting many nonprofits. If an employer had fewer than 20 employees on 50% of its “typical business days” during the previous year, it meets this exception. Additionally, under the final rules, self-employed individuals and independent contractors who are covered under an employer’s plan are no longer counted as employees for the purpose of meeting this exception, though these same individuals may be counted as employees for other determinations under COBRA.

New proposed regulations further define this exception. If adopted, each part-time employee would count as a proportional fraction of a full-time employee. Thus, for purposes of determining whether an employer is a “small” employer, two part-time employees who work 25 and 15 hours a week, respectively, would count as one full-time employee.

Nonprofits should also be aware that some states have COBRA-like laws that apply to small employers. Similarly, some employers not required to offer COBRA nevertheless provide continuation coverage as part of their group plans. Employers should check the applicable statutes and plans to make sure their operations comply with state, plan and federal obligations.

COBRA does not apply to employers that normally employ fewer than 20 employees.

Continuation of ‘Non-Core’ Coverage

The final regulations also make a change concerning ‘non-core’ coverage. The proposed regulations required that beneficiaries be given the option to choose only ‘core’ coverage or to include non-core coverage options. Under the final regulations, employers are entitled to require beneficiaries to either elect all of the health coverage to which they were entitled while employees, including ‘non-core’ coverage options, or no coverage at all. However, the IRS has proposed regulations and invited comments on whether plans should be required to offer core coverage separately.

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New FEC Membership Regulations, cont.

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The rules do not, however, allow the federal PAC of a membership organization to solicit contributions from members of the organization’s affiliates.

Under the new rules, members of an organization include all those who pay annual dues of a predetermined amount. The rules do not require a minimum dues payment. Further, the FEC has indicated that it will allow a reasonable grace period during which members can renew their memberships so long as the organization maintains and enforces an annual dues requirement.

In the absence of an annual dues requirement, members of an organization include all those who have some sort of voting rights in the organization, such as the ability to vote for a board member, and who annually affirm their membership. The annual affirmation requirement can be met in a variety of ways, such as signing in at a meeting or responding to a membership questionnaire.

Finally, the regulations require that a membership organization be operated or administered by the members. This does not mean that members must approve all of the organization’s actions, or even that all members must have voting rights. For instance, an organization with a self-perpetuating board will satisfy this requirement if all board members are also members of the organization. The organization must state membership rights and qualifications in its formal corporate documents that are made available to the membership. Further, it must solicit people to become members, and must acknowledge membership in some manner, such as by sending a membership card or adding the member to a newsletter list.

The proposed rules were sent to Congress on July 30. Barring additional legislative action, they should become effective after they have been before Congress for 30 legislative days, meaning sometime this fall.

Organizations in compliance with all portions of the regulations except the section requiring that membership rights and qualifications are set forth in the organization’s corporate documents may be considered in compliance so long as they take the first opportunity to revise their corporate documents.

Under the new regulations, a membership organization must:

- be comprised of members who have the power and authority to run the organization’s programs;
- state the qualifications for membership in its formal corporate documents;
- make their formal corporate documents freely available to their members;
- expressly solicit persons to become members of the organization;
- expressly acknowledge the acceptance of membership; and
- not be organized primarily for the purpose of influencing federal elections.

If an organization meets all of the criteria for membership organizations, it can consider as members people or organizations:

- with some significant financial attachment to the organization, such as significant investment or ownership stake in the organization.
- who pay annual membership dues of a predetermined amount.
- with a significant organizational attachment including:
  - annual affirmation of membership, and
  - direct participatory rights in the governance of the organization (e.g., voting rights).
Accounting for Experts

Nonprofits often require sophisticated accounting expertise to handle the more intricate reporting and accounting requirements. A new book dispenses such complex analysis and recommendations that it may be useful to specialists providing these services.

Not-for-Profit GAAP 1999: Interpretation and Application of Generally Accepted Accounting Principles for Non-Profit Organizations (New York: John Wiley and Sons, 1999) tackles the difficult and often daunting subject of nonprofit accounting. Its authors, Richard F. Larkin and Marie DiTommaso, have compiled a comprehensive reference work which will aid accountants, finance staffers, Treasurers of the Board, and business-savvy Executive Directors.

This annually-updated book explores the unique conventions of nonprofit accounting as well as the general accounting principles that also apply to nonprofit organizations. The authors bring a business-intensive approach to their discussion, highlighting the technical ways in which nonprofit organizations differ from traditional businesses.

The book reproduces commonly-used IRS forms and provides several checklists of factors to be considered in various situations. For example, one checklist, designed as a question-and-answer flow chart, guides the practitioner through the process of fulfilling financial disclosure requirements. Additionally, fictional accounting statements are used to illustrate many topics and are likely to be useful in preparing similar statements.

Once chapter addresses recent changes in accounting methods, including the use of “net assets” rather than fund balances and new methods of recording contributions and investments. Another chapter, entitled “Principal Federal and State Tax Reporting and Regulatory Requirements,” discusses the differing structures and responsibilities of various tax-exempt organizations, as well as the broader issues of UBIT, state compliance requirements, and solicitation or asset registrations.

For those readers with a basic knowledge of accounting principles, this book can serve as an invaluable tool. The authors provide constructive recommendations in not only the complex details of nonprofit accounting, but also the larger issue of how its practice relates to accounting issues in general.
Act created a carrot to go along with the stick of fines. That carrot is better known as the Act’s safe harbor for political committees that demonstrate “best efforts” to obtain the required information. If committees make best efforts, the FEC will consider their reports to be in compliance with the act, regardless of the amount of information actually obtained.

Proving that a committee did make best efforts is relatively straightforward, if a bit cumbersome. All solicitations must include a clear, written request for the required information; the requests may not be in small type, easily overlooked, or difficult to read. For contributions more than $200 with missing information, a committee must make at least one follow-up request for the missing information within 30 days of receiving the contribution. The follow-up request may not include another solicitation. If made in writing, the follow-up request must include a pre-addressed return postcard or envelope. If made orally, the committee must keep written documentation of the requests. Finally, the committee must report previously missing information in amendments to its prior FEC reports.

In a recent FEC hearing, the Commission seemed predisposed to allow e-mailed requests for contributor information. The safe harbor would apply only if the e-mail address was verified, as evidenced by multiple back-and-forth communications using that address. As of press time, however, the e-mail allowance has not yet been formalized with a new regulation or advisory opinion.

Perhaps the best way to avoid the Friends of Jack Metcalf’s fate is to institute, in writing, a procedural system for best efforts compliance before the committee is hit with a complaint. Meticulous record-keeping, maintenance of those records and timely amendment filings will all help to keep an unwelcome fine at bay.

**To Meet the “Best Efforts” Safe Harbor, Political Committees Must:**

- Include in all solicitations a clear, prominent request for the required information. Pre-approved language: “Federal law requires us to use best efforts to collect and report the name, mailing address, occupation and the name of employer of individuals whose contributions exceed $200 in a calendar year.”
- If the contributor does not provide the information:
  - Make at least one stand-alone follow-up request, without another solicitation for a contribution.
  - Keep detailed, written records of the requests.
- File an amended FEC report providing previously missing information.

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**IRS Proposes Disclosure Rules for Private Foundations**

The IRS recently released proposed regulations implementing the new law on public availability of the exemption applications and tax returns of private foundations. The proposal mirrors the rules that were recently implemented for other nonprofit organizations, including the “widely available” exception and the provisions governing harassment activities [NN, 5/99, p.2].

However, as seems to be required by the statute, the regulations provide that private foundations will also have to release the names and addresses of their contributors. Other exempts may shield this information from public disclosure.

Comments are due by October 12 of this year. They may be submitted at www.irs.ustreas.gov/tax_regs/regslist.html, or sent to: CC:DOM:CORP:R; (REG-121946-98); Room 5226; Internal Revenue Service; POB 7604; Ben Franklin Station; Washington, DC 20044

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**Can I Have Your Number, cont.**

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Getting to Know Harmon, Curran, Spielberg & Eisenberg, LLP

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Nicole joined the firm in 1997, bringing substantial experience in federal election law and the tax laws applicable to nonprofit organizations. Prior to joining Harmon, Curran, Spielberg & Eisenberg, LLP, she provided in-house legal advice to the National Abortion and Reproductive Rights Action League (NARAL), a 501(c)(4) membership lobbying organization with an affiliated federal PAC, a 501(c)(3) charitable foundation and a national network of local affiliates. At Harmon, Curran, Spielberg & Eisenberg, LLP, she advises a wide variety of nonprofit organizations, including private foundations, charitable and lobbying organizations and political action committees. Nicole is a member of the Election Law Subcommittee of the Administrative Law Section of the American Bar Association, and of the Exempt Organizations Committee of the Tax Section of the District of Columbia Bar.