



# Trade Association and Membership Organization PAC Legal Overview

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Public Affairs Council – National PAC Conference  
March 4, 2019

# Objectives

- Review the basic FEC rules for establishing and administering a trade association and membership organization federal PAC
- Identify who may be solicited for contributions to a federal PAC and review guidelines for raising funds for a federal PAC
- Discuss PAC FEC reporting and recordkeeping requirements
- Evaluate various PAC fundraising techniques to determine their permissibility
- Discuss *McCutcheon v. FEC* decision invalidating individual aggregate biennial contribution limits
- Review *Citizens United v. FEC* ruling and the subsequent creation of “Super PACs” and increased electoral activities by Section 501(c) organizations

# Corporate Contribution Prohibition

- Trade associations and incorporated membership organizations are prohibited from making contributions to federal candidate committees and most other federal political committees
- Exception: Create and administer a Separate Segregated Fund (“SSF”) - also known as a Political Action Committee (“PAC”)
- The PAC’s “connected organization” is the trade association or membership organization

# Trade Associations vs. Membership Organizations

- 501(c)(6) vs. 501(c)(4) of the Internal Revenue Code
- A trade association is a particular kind of membership organization that is composed of persons and entities engaged in a similar or related line of commerce, is organized to promote and improve business conditions for that line of commerce, and is not operated for a profit
- Trade association members do not receive any net earnings from the trade association whereas some membership organizations are operated for a profit and distribute profits to their members

# Characteristics of Trade Association and Membership Organization Federal PAC

- Registers with the FEC within 10 days of formation
- Has connected organization
- Connected organization pays administrative and fundraising costs
- May only solicit organization's restricted class (except for twice-yearly solicitations to expanded class subject to special rules)

# Federal v. State PACs

## Options for PAC Fundraising:

- One Federal Account
  - All funds raised and spent subject to federal law
  - Individuals may contribute up to \$5,000 per calendar year; corporate contributions and contributions from foreign nationals are prohibited
  - Federal account may make contributions to state and local candidates and committees depending upon state law (may trigger state registration and reporting requirements)
- Two Accounts
  - Federal account subject to federal law
  - Nonfederal account subject to state law

# Deposits into Federal PAC

Must meet one of these conditions:

- 1) Funds are expressly designated or solicited for use in connection with federal elections;  
  
or
- 2) Contributors are informed that their contributions are subject to federal limits and prohibitions

# Definition of Member of a Membership Organization

- Satisfies the organization's requirements for membership AND
- Affirmatively accepts the organization's invitation to become a member and EITHER:
  - Has significant financial attachment, such as significant investment or ownership stake; or
  - Pays annual dues of a pre-determined amount; or
  - Has significant organizational attachment
- Members may be solicited at any time on behalf of the membership organization's PAC



# Definition of Member of a Membership Organization, Cont.

Significant organizational attachment includes:

- Right to vote directly or indirectly for at least one individual on membership's organization's highest governing board;
- Right to vote directly for organization's officers;
- Right to vote on policy questions where highest governing body is obligated to abide by results;
- Right to approve organization's annual budget; or
- Right to participate directly in similar aspects of organization's governance

# Who May be Solicited for a Membership Organization PAC?

- Restricted Class – may be solicited at any time
  - Executive and administrative personnel of the organization
  - Non-corporate members
  - Families of both
  
- Expanded Class – may be solicited twice a year
  - Rank-and-file employees of organization (and their families)
  - Employees whose wages are not subject to income tax withholding may not be solicited
  - Solicitations must be in writing and mailed to the solicitee's personal residence
  - Must appoint a custodian to receive contributions
  
- Unlike trade association PACs, membership organization PACs may not solicit the executive and administrative personnel of corporate members. See FEC Advisory opinion 2011-22 (Virginia Poultry Growers Cooperative).

# Who May Be Solicited for a Trade Association PAC?

- Restricted Class – may be solicited at any time
  - Executive and administrative personnel of the association
  - Compensated members of the board (must be compensated on salaried basis)
  - Noncorporate members
  - With prior approval, restricted class of corporate members
  - Families of all
- Expanded Class – may be solicited twice a year
  - Rank – and – file employees of the association

# What is a PAC Solicitation?

- Straightforward request for contributions for the PAC
- Information on how to contribute to the PAC
- Publicizing the PAC's right to accept unsolicited contributions
- Statements describing the importance of the PAC or thanking contributors
- Any other statements encouraging support of the PAC or facilitating contributions to the PAC

# What is NOT a PAC Solicitation

- Communications that:
  - Announce existence of the PAC
  - Explain law applying to the PAC
  - Provide statistical information about the PAC
  - Simply list candidates supported without suggesting that supporting the PAC will help elect those candidates
  - Don't encourage support for the PAC
  - Don't explain how to make contributions to the PAC
  - Request prior approval

# Prior Approval: Needed to Solicit Employees of Corporate Members of a Trade Association

- Must approve in writing (electronic format OK):
  - Approval necessary before solicitation
- Corporation may not authorize request from a different trade association for that year
- Multi-year approval OK if separate approval given for each year
- If a parent corporation is a member of a trade association but not the parent's subsidiaries, prior approval may only be granted by the parent corporation. The same rule applies if a subsidiary corporation is a trade association member but not the subsidiary's parent corporation: only the subsidiary may grant prior approval.

# Prior Approval, Cont.

- A request for prior approval may include a sample solicitation (marked as a sample), but prior approval materials should indicate that contributions may not be solicited until prior approval is granted
- Maintain copies of prior approval authorizations
- Prior approval process applies to trade association PACs only and is not required for members that are partnerships or LLCs electing partnership treatment for tax purposes

# Required PAC Solicitation Notices

- Contributions must be voluntary:
  - No threats
  - No trade association or membership organization dues or other mandatory fees
  
- Must provide notice:
  - Political purpose of PAC
  - Right to refuse to contribute without reprisal (*See* FEC MUR 7041 (Arizona Pipe Trades Local Union) (PAC solicitation failed to include notices that members had right to refuse to contribute))
  - Any contribution guideline = Suggestion (*See* FEC Advisory Opinion 2016-11 (Plains Cotton Growers) (approving suggested PAC contribution of \$1 per bale made to a membership organization's cotton producer members); *See also* FEC MUR 7041 (Arizona Pipe Trades Local Union) (PAC solicitation contribution guideline failed to inform members that guideline was mere suggestion and that members were free to contribute more or less without favor or disadvantage))



# Required PAC Solicitation Disclaimers

In addition to the required notices, the following disclaimers must be included on PAC solicitations and must be clearly readable:

- Contributions to the PAC are not tax deductible for federal income tax purposes
- Contributions will be used in connection with federal elections and are subject to the prohibitions and limitations of federal law; and
- The PAC is required to use its best efforts to obtain and report the name, address, occupation, and employer of individuals whose contributions aggregate over \$200 per year

- Ok to inform potential contributors that having a strong PAC is important to the trade association and would benefit the industry
- Ok to describe the PAC as helping to elect candidates who understand and support the trade association's interests
- Do not describe the PAC as facilitating access to candidates
- Do not state or imply that PAC contributions are linked to particular legislation or government actions
- Legal counsel should review all PAC solicitations before they are disseminated

# Collection Rules

- PAC money may be collected by:
  - Connected organization
  - Affiliated state/local organizations
    - State affiliates in a federation of trade associations: *See* FEC Advisory opinion 2017-13 (National Sorghum Producers)
- Collecting agent rules apply

# Collecting Agent Rules

- Collecting agents:
  - Temporarily deposit funds
  - Forward funds to the PAC in timely manner:
    - Contributions of \$50 or less – must forward within 30 days
    - Contributions exceeding \$50 – must forward within 10 days
      - Recommend following 10-day forwarding rule for all PAC contributions
  - Retain records of PAC contributions for three years
- PAC ultimately responsible for compliance

# PAC Contribution Recordkeeping Rules: Retain records for 3 years after FEC report to which they pertain is filed

- Contributions over \$50, record:
  - Amount
  - Date received
  - Donor's name and address
  - Full-size photocopy or digital image of the check
  
- Contributions aggregating over \$200, record:
  - Above information plus occupation and employer of individual donors

# PAC Recordkeeping Rules, Cont.

- For disbursements record:
  - Amount
  - Date
  - Name and address of payee
  - Purpose of disbursement
- For contributions record:
  - Above information plus name of candidate, state, district, and election designation
- If the PAC makes contributions at the state level, must maintain records under applicable state law

# Additional PAC Record Guidelines

- PACs should be careful when putting in writing the rationale or basis for contributing to a candidate:
  - Don't mention any particular official action (such as a vote on a particular piece of legislation or other specific governmental action)
  - Don't describe the contribution as helping to gain access to the candidate or as making possible certain legislative or governmental outcomes
  - Recommend limiting the documentation to general, objective reasons and criteria for supporting the candidate (e.g., the candidate's knowledge and support for the industry, general issue positions, and congressional leadership/committee membership)

# PAC Treasurer and Assistant Treasurer Duties

- Deposit receipts and authorize expenditures
- Monitor contributions for compliance
- Maintain all required records
- Sign FEC reports and file accurate reports on time
- Treasurer must be in place at all times; recommend appointment of assistant treasurer who can act in treasurer's absence



# PAC FEC Reporting

- PACs must file FEC reports during election years on either a monthly or quarterly basis
- Monthly PAC filers typically file on the 20<sup>th</sup> day of each month
  - Exceptions:
    - Year-End report due January 31<sup>st</sup>
    - Pre- and Post- General instead of November and December Monthly Reports
- Quarterly PAC filers typically file on the 15<sup>th</sup> day of the month following each calendar quarter
  - Exceptions:
    - Year End Report due January 31<sup>st</sup>
    - Post-General required in addition to quarterly reports
    - Pre-General and/or Pre-Primary reports may be required in addition to quarterly reports, depending on activity
- Monthly PAC filers are not required to file Pre-Primary reports

# PAC FEC Reporting, Cont.

- The FEC sends a Request for Additional Information (“RAI”) if there is an error or omission on a PAC FEC report.
- RAIs are only sent by email to the address or addresses provided on the PAC’s Statement of Organization.
- It is important to ensure that the PAC responds adequately and on time to all RAIs.

# PAC Treasurer FEC Liability

- PAC treasurers generally named in FEC enforcement actions only in their official capacity
- PAC treasurers can also be named in FEC enforcement actions in their personal capacity and can face personal liability if they:
  - Knowingly and willfully violated the election laws;
  - Recklessly failed to fulfill duties; or
  - Intentionally ignored information that led to the violation

# Recommended PAC Internal Controls

- The FEC has issued a policy statement indicating that if a PAC takes certain steps to try to prevent misappropriation of funds, the presence of such safeguards will reduce or preclude FEC civil penalties against the PAC for filing inaccurate disclosure reports as a result of embezzlement.
- For the FEC safe harbor to apply, PACs must establish the following internal controls:
  - Only the treasurer (or his designated agent) should have the authority to open and close bank accounts.
  - All bank accounts should be opened in the name of the PAC using the PAC's employer identification number (EIN).
  - The number of persons authorized to sign checks should be limited and should be identified in writing in the PAC's internal policies.
  - Check signing should be the responsibility of individuals having no access to the accounting records.
  - All checks over \$1000 should be signed by two individuals.
  - All wire transfers should be authorized in writing by two individuals.

# Recommended PAC Internal Controls, Cont.

- PACs should establish the following accounting and financial practices:
  - Prior to filing each FEC report, reconcile bank account and accounting records with disclosure reports. Bank records should also be reviewed for unauthorized transactions each month.
  - Reconciliations should be conducted by someone other than a check signer or individual responsible for handling the PAC's daily accounting.
  - The individual monitoring receipts should make a list of all receipts and place a restrictive endorsement on checks.
  - Receipts should be deposited daily.
  - Disbursements should be made with pre-numbered checks.
  - If the PAC has a petty cash fund, an imprest system is used.
  - The petty cash fund should be limited to \$500.

# Recommended PAC Internal Controls, Cont.

- If a misappropriation of funds is discovered, the PAC, after consulting with legal counsel, should:
  - Notify the relevant law enforcement authorities;
  - Notify the FEC; and
  - Voluntarily file amended reports to correct any reporting errors due to the misappropriation

# PAC Solicitation and Fundraising Techniques

- Payroll Deduction
- Combined Dues/Solicitation Statements
- Convention Booths
- Promotional Items
- Charitable Matching Plans
- Written Communications
- Internet Communications

# PAC Fundraising Techniques:

## 1. Payroll Deduction

- Basic Rules Apply:
  - Restricted class only
  - Solicitation notices and disclaimers always (See FEC MUR 7041 (Arizona Pipe Traders Local Union) (PAC payroll deduction form failed to inform members that they had right to refuse to contribute and were free to contribute more or less than suggested contribution amount without favor or disadvantage))
  - Forward contributions and records within required 10/30 day collecting agent time frames
- Written Authorization Required:
  - Use Payroll Deduction Authorization (“PDA”) forms
  - No reverse check off; need affirmative consent in writing
  - Retain PDAs for three years after last reported contribution from employee



# Payroll Deduction – FEC Rules for Trade Association PACs

- FEC regulations allow corporate members of a trade association to provide payroll deduction for their employees' contributions to the trade association's PAC (after prior approval granted)
- Corporate member must permit use of payroll deduction by union for its PAC (union must pay costs)
- See FEC Advisory Opinion 2012 – 15 (American Physical Therapy Association) (Trade association with no corporate members may use payroll deduction for trade association individual members who are employed by corporations that are owned by trade association members; trade association or trade association PAC must pay costs)

# PAC Fundraising Techniques:

## 2. Combined Dues/Solicitation Statements

Basic Rules Apply:

1. Restricted Class Only
2. Solicitation Notices and Disclaimers Always – Layout Important: must be clear which fees are required dues payments and which payments are voluntary PAC Contributions
3. Forward Contributions and Records On Time

# PAC Fundraising Techniques:

## 3. Convention Booths

Basic Rules Apply:

1. Restricted Class Only
    - Signs on booth stating policy
    - Booth personnel must enforce
    - No PAC promotions outside restricted class
  2. Solicitation Notices and Disclaimers Always
  3. Forward Money and Records on Time
- Convention booths may also be used to obtain prior approval for trade association PACs (no PAC solicitations can be made until prior approval is obtained); can also operate hybrid prior approval/solicitation booths

# PAC Fundraising Techniques

## 4. Promotional Items -- Raffles, Prizes, Etc.

- A PAC's connected organization can provide goods, services, and other promotional items to encourage PAC contributions; if a raffle or sweepstakes is conducted, must comply with applicable state law (sweepstakes are easier to conduct)
- A trade association may solicit and accept donations of money, goods, and services from its members (including corporate members) to defray overhead and fundraising costs for the PAC
- A trade association may accept unsolicited donations from individuals who are not members of the trade association to defray overhead and fundraising costs for the PAC, but such donations count as in-kind contributions to the PAC subject to each individual's contribution limit (non-member corporations are prohibited from making such contributions)

# PAC Fundraising Techniques

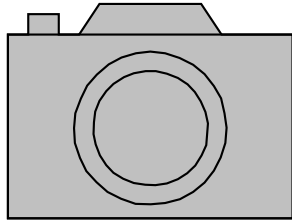
## 4. Promotional Items—Raffles, Prizes, Cont.

- Basic rules apply:
  - 1) Offer to restricted class only
  - 2) Solicitation Notices and Disclaimers always
  - 3) Forward contributions and records on time  
(Note: for ongoing fundraising events, assign end date)
  - 4) Be aware of one-third rule

# One-Third Rule

- If the cost of a promotional item provided by the PAC's connected organization is more than one-third of the amount raised in contributions, then the PAC is required to reimburse the connected organization for a portion of the cost of the prize
- If at least three times more money is raised than the cost of the promotional item, no reimbursement is required
- One-third rule does not apply to food and drink; the rule only applies to promotional items and professional entertainment

# One-Third Rule



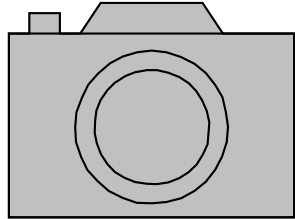
\$300



\$900

Cost of prize:	\$300
1/3 amount raised:	<u>\$300</u>
Reimbursement:	\$ 0

# One-Third Rule



\$300



\$600

Cost of prize:	\$300
1/3 amount raised:	<u>\$200</u>
Reimbursement:	\$100



# PAC Fundraising Techniques:

## 5. Charitable Matching Plan

- OK to match a PAC contribution with a connected organization donation to a charity
- The connected organization may allow contributors to designate a charity or can select charities
- For years the FEC has allowed PAC contributions to be matched dollar-for-dollar, according to a specific percentage (up to 100%), or only above a certain contribution amount. A majority of FEC Commissioners recently upheld a charitable matching program that went beyond a 1:1 match (FEC MUR 6873 (Wal-Mart) (upholding 2:1 match ratio)
- Neither the contributor nor connected organization can take a tax deduction from the charity; PAC contributors can be recognized by the charity and can receive a token gift
- Can be used for twice-only solicitations beyond the restricted class

# PAC Fundraising Techniques:

## 6. Written Communications

### Basic Rules Apply

- PAC Solicitations to Restricted Class Only
  - De Minimis Circulation Exception:
    - Both number and percentage of persons beyond restricted class must be incidental (up to 1,000 recipients or 3% of total recipients ok); and
    - Include caveat that contributions will be screened and those from outside the restricted class will be returned
- Solicitation Notices and Disclaimers Always
- Forward Contributions and Records on Time

# PAC Fundraising Techniques:

## 7. Use of Internet/Intranet and Email

Basic Rules Apply:

- Restricted Class Only
  - Use password protected page for all PAC solicitations; one password for all members of the restricted class ok
  - Link page must include caveats that contributions will be screened and those from outside the restricted class will be returned
- Solicitation Notices and Disclaimers Always
- Forward Contributions and Records on Time

# Aggregate Individual Contribution Limit Struck Down

- In April 2014, the Supreme Court in *McCutcheon v. FEC* invalidated the individual federal aggregate biennial contribution limit as unconstitutional under the First Amendment.
- The aggregate contribution limit restricted how much an individual could contribute in total to all federal candidates and committees during a two-year election cycle.
- Following *McCutcheon*, individuals are now free to contribute to as many federal candidates and committees as they would like, subject to the base per-recipient contribution limit.
- The individual base contribution limits to federal candidate committees and national political party committees are adjusted for inflation each election cycle.

# *Citizens United v. FEC*

- In January 2010, the Supreme Court issued a landmark ruling in the *Citizens United v. FEC* case.
- In *Citizens United*, the Supreme Court struck down the decades-old prohibition on corporate expenditures made out of general treasury funds in connection with federal elections as unconstitutional under the First Amendment.
- The Court in *Citizens United* also invalidated the McCain-Feingold law's restrictions on certain corporate advertising paid for out of general treasury funds depicting federal candidates in the last 60 days before a general election and the last 30 days before a primary.

# Election Law Restrictions Struck Down in *Citizens United*

- The Supreme Court's decision in *Citizens United* invalidated a number of key restrictions on corporate advertising to the general public regarding federal candidates and officeholders and other corporate expenditures in connection with federal elections.
- Following *Citizens United*, legal restrictions on the content and timing of such advertisements by corporations, incorporated trade associations, and other 501(c) organizations no longer exist.

# Election Law Restrictions Struck Down in *Citizens United*: Content Restrictions

- For decades, the federal election laws prohibited corporations from making expenditures from their general treasury funds in connection with federal elections.
- These statutory provisions prohibited corporations from using their general treasury funds to disseminate public communications that expressly advocated the election or defeat of clearly identified federal candidates because such communications were deemed to be prohibited corporate expenditures in connection with federal elections. This restriction did not apply to PAC funds.
- However, in *Citizens United* the Court struck down the restriction on corporate expenditures in connection with a federal election as unconstitutional on its face.

# Election Law Restrictions Struck Down in *Citizens United*: Content Restrictions, Cont.

- As a result, corporations, incorporated trade associations, and other 501(c) entities now have the legal ability to disseminate public communications concerning federal candidates and officeholders without any content restriction at all – even corporately funded express advocacy communications are permissible.
- These entities are still prohibited from coordinating public communications with federal candidates or other federal political committees.



# Election Law Restrictions Struck Down in *Citizens United*: Time Restrictions

- Under the McCain-Feingold campaign finance law enacted in 2002, corporations were also subject to an advertising blackout period in the last 60 days before a general election and the last 30 days before a primary election.
- Communications that are aired during these time periods, refer to or depict a clearly identified federal candidate, and meet certain other conditions are electioneering communications and corporate general treasury funds could not be used to finance such communications. This restriction did not apply to a corporation's PAC funds.

# Election Law Restrictions Struck Down in *Citizens United*: Time Restrictions, Cont.

- The Supreme Court in *Citizens United* invalidated the McCain-Feingold law's electioneering communications restrictions as unconstitutional under the First Amendment.
- As a result, corporations, incorporated trade associations, and other 501(c) organizations are now able to disseminate advertisements paid for out of their general treasury funds concerning federal candidates and officeholders at any time — even in the final weeks and days before an election.

# Legal Requirements that Remain in Effect After *Citizens United*

- There remain a number of important legal restrictions and requirements that apply to corporate and trade association expenditures that are made in connection with federal elections.
- The *Citizens United* decision did not disturb the prohibition on direct corporate and trade association contributions to federal candidates, federal PACs, national political parties, and the federal accounts of other political parties.
- Accordingly, corporate and trade association PACs remain an important vehicle for making contributions at the federal level.

# Legal Requirements that Remain in Effect After *Citizens United*: Coordination Prohibition

- The Court's ruling did not affect the FEC's longstanding treatment of certain coordinated communications as in-kind contributions subject to the contribution limits and source prohibitions of federal law.
- Accordingly, it is critical that any public advertising that is done by corporations and trade associations not be coordinated with federal candidates and other federal political committees.
- Communications that a corporation, trade association, or labor union makes to its restricted class expressly advocating the election or defeat of a clearly identified candidate must be disclosed to the FEC if disbursements for the communications exceed \$2,000 per election.

# Impact of the *Citizens United* Ruling: Super PACs

- Following *Citizens United* and other court cases, the FEC issued Advisory Opinions making clear that corporations, trade associations, and membership organizations may establish and contribute to independent expenditure-only PACs, which are more commonly known as “Super PACs.”
- Super PACs may accept unlimited contributions and make unlimited independent expenditures, but they may not make any contributions to federal candidates or other federal political committees.
- Trade associations and membership organizations may create Super PACs and may solicit contributions from the general public.
- Trade associations and membership organizations may also pay the administrative and overhead expenses associated with operating Super PACs (any such payments are in-kind contributions to the PAC and must be reported to the FEC).

# Super PACs, Cont.

- In the wake of *Citizens United* and other court rulings, Super PAC and 501(c) group electoral spending has exploded in recent election cycles
- Outside groups spent a record-breaking \$1.5 billion in connection with the 2016 presidential election cycle, which was over four times more than such groups spent on the 2008 presidential race
- Outside groups spent more than \$1.3 billion on the 2018 midterm election, which was nearly three times what they spent on the 2014 midterm
- If history is any guide, we will see record amounts of outside group spending during the 2020 election cycle

# Conclusion

- The FEC's trade association and membership organization PAC rules are very complex and ever-growing
- The Supreme Court's *Citizens United* ruling has provided new opportunities for incorporated entities to make expenditures in connection with federal elections, but significant legal compliance requirements remain in this area
- When in doubt, consult a lawyer

# QUESTIONS?

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