

Political Law Alert

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2020 Election Year Issues: 501(c)(4) Organizations and Dark Money

With the 2020 election campaign in full swing despite the COVID-19 pandemic, companies are facing a variety of both typical and unique challenges regarding political law compliance. This is the third in a series of mailings discussing political law issues that take on greater importance during a presidential election year.

In the decade since the Supreme Court's *Citizens United* decision, politically active nonprofits organized under Section 501(c)(4) of the Internal Revenue Code (IRC) have played an ever-increasing role in politics. 501(c)(4) organizations may accept unlimited corporate and personal donations and engage in political activity, such as by making independent expenditures, doing so in most jurisdictions without disclosing their donors. These organizations are common and can be aligned with either party, certain interest groups and even government officials or candidates at the federal level and in many states. Although the lack of donor disclosure can make this organizational structure appealing to many donors, 501(c)(4)s also can present significant legal and compliance risk, as recently seen in the indictment of the speaker of the Ohio House of Representatives, certain of his associates and the 501(c)(4) organization they controlled.

Under the IRC, a 501(c)(4) is a nonprofit organization that must be primarily engaged in "social welfare" activities, and also may engage in political activity, as long as such political activity is not the organization's primary activity. However, the Internal Revenue Service has not clarified how to determine whether political activity is an organization's primary activity, making it common for 501(c)(4) organizations to engage in significant political activity. As such, beyond the tax status, one must take a holistic approach when considering other laws that may apply to such organizations.

Donations to a 501(c)(4) can present legal risk primarily in five areas for the donor:

- **Linkage:** A donation to a 501(c)(4) that is linked with a government action may form the basis of a federal prosecution under the "honest services fraud" provision of the federal mail and wire fraud statute. As we have seen in previous applications by prosecutors and courts, an honest services fraud violation can result even if there is no express *quid pro quo* agreement, but merely evidence suggesting that there is a link between a benefit, such as a donation, and the public official performing an official act.
- **Illegal Dark Money:** If, for the purpose of obscuring the source of a contribution, a donor to a 501(c)(4) donates with the intent or understanding that the organization then will contribute to another organization, there is a potential dark money legal issue. Generally, political contributions must be made in the name of the true source of the funds and not obscured by a conduit.

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- **Campaign Finance:** Although 501(c)(4) organizations that only make independent expenditures are not subject to contribution limits, a 501(c)(4) that coordinates its activities with candidates or parties, or otherwise contributes to campaigns and parties, will generally be subject to contribution limits as a PAC. In federal and certain state elections, corporate contributions also would be impermissible. Thus, the organization's failure to comply with campaign finance coordination rules may cause a donation to the organization to be viewed as an impermissible contribution.
- **Misuse of Funds:** As with any organization that is not transparent in its spending, there is a risk of 501(c)(4) organization funds being misused. In addition, as a tax exempt organization, a 501(c)(4) may not be used for the benefit of any one individual or a particular business interest. For example, the use of funds for gifts and entertainment benefitting public officials or other individuals controlling the organization may be improper
- **Pay-to-Play:** Although 501(c)(4) organizations are generally not covered under state and local pay-to-play rules, they could be a vehicle for an indirect violation of a federal pay-to-play rule.

One can see most of the above elements in the recent indictment of Ohio House Speaker Larry Householder, as well as several consultants and lobbyists, and the 501(c)(4) organization with which they were involved. The indictment alleged a link between \$60 million in donations and legislation pushed by Mr. Householder that benefitted the donor. It also noted that the 501(c)(4) organization secretly donated to another 501(c)(4), which then made a reportable contribution to a super PAC. Moreover, the indictment suggested that certain spending by Ohio campaigns funded by the 501(c)(4) was coordinated. Finally, the indictment alleged that more than \$400,000 from the 501(c)(4) also was used to provide a personal benefit to Mr. Householder, including payment of his debts and vacation home expenses.

Given this indictment and other cases involving these organizations, companies and individuals considering donations to politically active 501(c)(4) organizations in the 2020 cycle should evaluate the circumstances of the donation and organization in light of these risk areas.

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