

# Chapter IV: Establishing And Operating A Separate Segregated Fund

## **THE CONNECTION**

Strategies for Creating and  
Operating 501(c)(3)s, 501(c)(4)s  
and Political Organizations

Third Edition

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# CHAPTER IV: ESTABLISHING AND OPERATING A SEPARATE SEGREGATED FUND

A separate segregated fund (SSF) is a political organization that is tax-exempt under Internal Revenue Code section 527. It may be a Traditional Federal PAC, State PAC, or a 527 organization that does not report to the Federal Election Commission. At the time of publication, the issue of whether a Super PAC may be established as an SSF is unresolved. Assuming that this issue is clarified in the future, the rules discussed below will apply to Super PACs as well, except where noted. (See Chapter V.) An SSF may be established and maintained by a 501(c) organization, including a 501(c)(4), but not a 501(c)(3).<sup>1</sup> Generally, an SSF's purpose is to conduct political activities in which the 501(c)(4) is not permitted to engage or that may subject the 501(c)(4) to tax if they are carried out directly. The SSF account must be strictly segregated from the other accounts of the 501(c).

This chapter describes the basic rules for (1) establishing an SSF, (2) starting an SSF that is a Federal PAC registered with the FEC, (3) accounting and reporting responsibilities for all Federal PACs, and (4) registering with the Internal Revenue Service (IRS) as an SSF that intends to conduct activities to influence elections without triggering registration and reporting requirements under federal or state campaign finance law (a "527"). You will need to consult state law to determine the rules for establishing an SSF that operates as a state-level political committee.

## A. RULES APPLICABLE TO ESTABLISHING ALL SSFS

### 1. How to Organize the Committee

There are some rules that apply to all SSFs whether they are registered with the FEC, state agency, or the IRS. There are others that apply only to certain SSFs, and those distinctions are noted.

In order for an SSF to qualify and maintain eligibility for tax exemption under IRC section 527, it must be organized and operated for the purpose of accepting contributions and/or making expenditures for an exempt function. An "exempt function" means influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office. An SSF is not required to apply to the IRS for recognition of its exemption from federal tax.

Federal law does not require any specific form of organization for an SSF, and it does not require that an SSF manage its affairs by the terms of bylaws or other formal organizing documents. In this sense, SSFs have a wide range of organizational options available to them. Some SSFs authorize the treasurer to make virtually all major decisions. Other SSFs operate under more complicated arrangements for making these decisions, such as the use of an executive committee that draws on the participation of leaders in the connected 501(c)(4) organization to make contribution and other operating decisions.

### 2. Employer Identification Number

The SSF must apply for an employer identification number (EIN) by filing a Form SS-4 with the IRS. The SSF may not use the EIN of its connected 501(c)(4) if it wishes to have a separate legal identity from the 501(c)(4). Generally, a bank will not open an account until the SSF has obtained an EIN. This step must be taken even if the SSF will not have any employees of its own. The IRS online Form SS-4 (Application for EIN) can be found online at <http://www.irs.gov/businesses/small/article/0,,id=102767,00.html>.

**All fundraising solicitations for SSFs must remind potential donors that contributions to these organizations are not tax-deductible.**

### 3. Depository

The SSF must open a bank account(s) into which all funds must be deposited and from which all expenditures must be made. It is impermissible for any SSF to receive and spend funds without first depositing them in the depository account.

### 4. Fundraising

All fundraising solicitations for SSFs must remind potential donors that contributions to these organizations are not tax-deductible. (See the disclaimer requirements in Chapter II, § (D)(7).)

It may be possible for a 501(c)(4) organization to transfer funds to an SSF *that is not a Federal PAC*, as long as the transfers are made “promptly and directly.”<sup>2</sup> If the transfer is not made “promptly and directly,” the amounts transferred will be considered exempt function expenditures (expenditures for political activity) subject to tax under IRC section 527. The rules governing these transfers, summarized briefly below, are very complex and require careful attention.

- The transfer procedures must be made in accordance with applicable state and federal law.
- The 501(c) organization must maintain adequate records to demonstrate that the transfer was made up of dues or political contributions, not investment income.
- The dues or contributions may not be used to generate investment income for the 501(c) organization. This requirement prevents the organization from holding funds for a significant period of time in an interest-bearing account and transferring them to the SSF. For this reason, many organizations choose to use non-interest-bearing accounts to collect dues and contributions. If an interest-bearing account is used, the transfers must be made “promptly.” The IRS ruled informally that funds were transferred “promptly” when the transfers were made once or twice a month.<sup>3</sup>

The FECA, applicable to all Traditional PACs and Super PACs, has many additional rules and requirements for fundraising discussed in Section B of this Chapter. State law varies and must be consulted to determine if a 501(c)(4) may transfer funds and, if so, the applicable rules.

### 5. Tax Returns

Certain SSFs must file Form 990 or Form 990-EZ, depending on their registration and revenue. All Federal PACs and Super PACs are exempt from these filings. For SSFs that are not registered with the FEC, the filing requirements depend on whether or not the committee is a qualified state or local political organization (QSLPO), meaning that it is registered and reports in a state whose law requires disclosure of all contributors who donate at least \$500 per year to the PAC and of all entities that receive at least \$800 per year of its spending. QSLPOs must file Form 990 or Form 990-EZ *only* if the committee has gross receipts of \$100,000 or more. Non-QSLPO committees must file Form 990 or Form 990-EZ if their gross receipts are \$25,000 or more. No section 527 political organizations (including both QSLPOs and non-QSLPOs) are required to file a Form 990-N. Additional information on Form 990 filing requirements may be found at <http://www.irs.gov/charities/political/article/0,,id=163097,00.html>.

Forms 990 and 990-EZ are due on the fifteenth day of the fifth month after the close of an organization’s tax year. An organization may obtain an automatic three-month extension on its Form 990 or 990-EZ by filing Form 8868 prior to the date on which its Form 990 or 990-EZ is due.

The SSF must also file a tax return (Form 1120-POL, “Income Tax Return for Certain Political Organizations”) on the fifteenth day of the third month after the end of the tax year if it has investment income (including interest or dividends) or nonexempt function

expenditures in excess of \$100 during the tax year. The due date for an SSF with a tax year ending December 31 is March 15. There may be similar state filing requirements.

## B. ESTABLISHING AN SSF THAT IS A FEDERAL PAC

Throughout this section, the term “SSF Federal PAC” is used to discuss Traditional PACs. If a Super PAC is formed as an SSF, many of the rules will be the same. In cases where there are different rules, those differences are noted.

### 1. Registering With the Federal Election Commission

An SSF Federal PAC must register with the FEC by filing a Statement of Organization (FEC Form 1) within 10 days of any action by the connected organization toward establishing it, including passage of a resolution by the board of directors of a 501(c)(4) authorizing the establishment of an SSF. This form requires certain basic information, including the formal name of the committee, the name and location of its bank, the name of its treasurer, and the custodian of its records. It does not matter whether the new SSF has raised any money. *As long as the connected organization has authorized raising money, it must register.*

Although the same form is used to register either an SSF Federal PAC or a Nonconnected Federal PAC, there are differences in how the form should be completed for each type of entity. These differences are highlighted below.

Filling Out the Statement of Organization (See Chapter 5 for special rules for Super PACs.)		
	SSF Federal PAC	Nonconnected Federal PAC
1. Full name and address of Federal PAC	Must include the full name of the sponsoring corporation; address may be a post office box	No federal rules on naming a nonconnected committee
2. Date	The date on which the Statement of Organization is submitted to FEC	
3. Amendment	Because this is the initial filing and not an amendment to a previous filing, check “no” box	
4. Type of Committee	Check box (e) (“This committee is a separate segregated fund”); the committee must indicate whether or not it is a lobbyist/registrant PAC.	Check box (f) if the committee plans to support or oppose more than one federal candidate
5. Connected Organization/ Affiliated Committees	The connected organization is the corporation setting up the SSF; affiliated committees are any Federal PACs established by the parent or subsidiaries of the parent. The box for “corporation” should be checked under the larger box.	Generally no, unless the committee is affiliated with another registered political action committee; generally, committees are affiliated when they are established, financed, maintained, and controlled by the same person or organization.
6. Custodian of Records	Usually the PAC treasurer, although some organizations use an outside accountant for this purpose	
7. Treasurer	Anyone, including a nonemployee or an officer of the connected organization; the appointment of an assistant treasurer is advisable in the event that the treasurer is not available. (See § C(4) of this chapter for discussion of the treasurer’s legal liability.)	
8. Depository	The bank or other financial institution in which the PAC deposits its funds; it is not necessary to list multiple accounts in the same bank.	

### 2. Name of the Committee

The official name of the SSF Federal PAC must include the full name of its connected organization. A shortened form of the official name may be used on letterhead or checks, provided that the short name includes a clearly recognizable abbreviated form or acronym.

### Example:

If the PEN Board decides to set up a Federal PAC, the name of the new organization cannot simply be “Political Action Committee” or “Good Government Fund.” The official name must be “Protect the Environment Now Political Action Committee.” The PAC may indicate on its Statement of Organization that it will use PENPAC as a well-known abbreviation, but that cannot be the official name.

### 3. Affiliation of SSF Federal PACs

All SSF Federal PACs established, financed, maintained, or controlled by different parts of the same organization are considered to be affiliated. Thus, SSF Federal PACs established by regional or state groups or chapters of the same 501(c)(4) organization are affiliated with the parent’s Federal PAC. However, some local organizations are only loosely associated with a national organization, and therefore their SSF Federal PACs may not be considered affiliated. To determine whether your organization is affiliated with another organization, it is wise to consult an attorney.

Under certain circumstances, Federal PACs *not* established by the same parent may be considered affiliated. The FEC looks at the following factors, among others, to determine affiliation: similar patterns of contributions; large transfers of money from one organization to another; or “common control,” such as control by one Federal PAC or its connected 501(c)(4) over another PAC’s decision-making authority.

The consequences of affiliation are important. Affiliated committees share a single limitation on contributions to federal candidates. Thus, if a multicandidate parent SSF Federal PAC contributes \$4,500 to a particular federal candidate for an election, any affiliated Federal PACs would be collectively limited to contributing only an additional \$500 to the same candidate for the same election. Affiliated committees also share common limits on the contributions that they receive from the same donor. (See Chapter V regarding affiliation rules and Super PACs.)

### 4. Committee Officers

Federal law requires an SSF Federal PAC to name only one officer, a treasurer. The treasurer is responsible for processing all PAC receipts, authorizing contributions and expenditures by the PAC, maintaining PAC books and records, and seeing to the preparation and timely filing of accurate financial disclosure reports with the FEC. A custodian of records must also be designated. This role may be filled by the treasurer or another person responsible for day-to-day recordkeeping.

The treasurer may delegate day-to-day accounting and reporting responsibilities to another person. However, the treasurer remains the responsible party for purposes of federal law. Without a treasurer, an SSF Federal PAC may not accept contributions or make expenditures. These PACs are advised to avoid the occurrence of any such vacancy by providing for one or more assistant treasurers who can automatically assume the position of treasurer if the treasurer is unavailable for some reason.

The decision to name any other officers, such as a chairman or executive officer, is completely within the discretion of the connected organization or the SSF Federal PAC itself. Appointment of other officers does not relieve the treasurer of any responsibility.

## 5. Depository

The bank account for an SSF Federal PAC may be in any national or state bank or federally insured credit union or savings and loan. The PACs may have as many depositories, and as many accounts in each depository, as needed. The accounts in the same bank do not need to be listed separately on the Statement of Organization.

### Example:

PENPAC was established to conduct express advocacy activities in federal elections. The PEN board met and passed a resolution to organize PENPAC. A bank account was opened for the PAC. No corporate money (i.e., PEN funds) may be deposited in the account. The funds must be raised for the specific purpose of supporting the PAC and deposited in the PAC account. PEN decides to appoint four volunteers, including one of the PEN Board members, to direct the PAC's activities.

## 6. 501(c)(4) Support for an SSF Federal PAC

It is important to note that the rules on corporate support for a Super PAC, discussed in Chapter V, differ from those discussed below.

A 501(c)(4) may pay the administrative and fundraising costs of its SSF Federal PAC, or the SSF may pay some or all of these costs directly.<sup>4</sup> The 501(c)(4) may, for example, pay all the costs for office space, staff, telephones, office supplies, and legal and accounting services. Staff of the 501(c)(4) may work on administrative activities of the SSF Federal PAC or Super PAC without allocating the salary among other 501(c)(4) activities and the SSF. Similarly, the 501(c)(4) may absorb all other costs of the SSF's administration. These costs may be considered exempt function expenses and therefore count against the primary purpose of the connected 501(c)(4). In addition, the costs must be reported on the Form 990 of the connected 501(c)(4). (See Chapter I, § C(5).) They are not, however, subject to section 527(f) tax because they are covered under the reserved section of the regulations.<sup>5</sup>

In the event that the SSF Federal PAC pays any administrative cost that is payable by the 501(c)(4), it may seek reimbursement from the 501(c)(4), provided that the reimbursement is made within 30 days of the original payment by the SSF.<sup>6</sup> Apart from such reimbursements, the 501(c)(4) may *not* give money to the SSF Federal PAC for administrative or any other purposes. All payments for the benefit of the SSF must be made directly by the 501(c)(4) to the vendors or suppliers of services, provided "in-kind" by the 501(c)(4) itself or made as reimbursements to the SSF within 30 days.

The 501(c)(4) may *not* lend funds to the SSF Federal PAC. Federal law expressly prohibits such loans.<sup>7</sup>

The SSF Federal PAC may pay for 501(c)(4) activities, but this must be done carefully. If the expenditure is not clearly for the purpose of influencing an election, it may be taxable under the Internal Revenue Code. For example, if the SSF Federal PAC pays for a lobbying workshop, it may be subject to tax on that expenditure.

If the SSF Federal PAC wants to use any resources of the 501(c)(4) organization to make an in-kind contribution to a federal candidate, Federal PAC, or political party, the fair market value of the resources must be paid *in advance* by the SSF Federal PAC to the 501(c)(4).<sup>8</sup> Otherwise the 501(c)(4) will be considered to have made a prohibited corporate contribution. The SSF Federal PAC may advance a specific amount to cover a particular use of corporate resources, or it may advance of a lump sum to cover multiple uses that it anticipates in the future.

### Example:

PENPAC pays its share of the monthly rent and the costs of a PAC meeting to decide on endorsements and next year's agenda. PENPAC may seek reimbursement from PEN and deposit the reimbursement in the PENPAC account within 30 days. A deposit of PEN funds into the PENPAC account under any other circumstances would violate the FECA.

## 7. Fundraising Rules for an SSF Federal PAC

A 501(c)(4) corporation establishing an SSF Federal PAC may solicit contributions to the SSF only from its executive and administrative personnel and their families.<sup>9</sup> In addition, if the 501(c)(4) has “members,” contributions may be solicited from these members and their families. (See below for a discussion of the meaning of “member” in this context.) If the connected 501(c)(4) has an affiliated 501(c)(3) membership organization, it may be possible for the SSF to solicit the members of the 501(c)(3) for contributions to the SSF.<sup>10</sup> The 501(c)(3) may not pay any of the costs of the solicitation and must take steps to ensure that it does not jeopardize its charitable status.

An SSF may not solicit or receive contributions from foreign nationals. A foreign national is a person who is not a U.S. citizen and does not have a “green card” to work in the United States.

### Example:

PENPAC decides to contribute the services of a PEN employee to Smith for Congress; PENPAC must pay in advance the estimated cost of the employee's salary and benefits to PEN. Alternatively, if PENPAC anticipates that it will be making additional in-kind contributions of staff services worth approximately \$5,000 to Smith and other candidates, PENPAC may advance \$5,000 to PEN and draw down on that advance as the funds are expended. If an advance payment is not made, but instead PEN is reimbursed after the expenditure, PEN has made a prohibited corporate contribution.

Under certain limited circumstances, a 501(c)(4) may also solicit contributions from nonexecutive or nonadministrative employees. All other potentially interested donors, such as members of the general public, may not be approached for contributions. Any solicitation outside of this permissible class violates federal law.

All fundraising solicitations for the SSF Federal PAC must include language informing the prospective contributor of the political purposes of the SSF, that all contributions are voluntary and the contributor has the right to refuse to contribute without reprisal, and that any suggested amounts listed on the solicitation are merely suggestions and more or less that the suggested amounts may be given.<sup>11</sup> A PAC solicitation does not require a disclaimer. It must, however, include a notice that contributions are not tax deductible.

An individual may contribute up to \$5,000 per calendar year to an SSF Federal PAC.

### a. Who Is a Member?

A member, under federal election law, is an individual who has an enduring financial or organizational connection to the 501(c)(4) organization.<sup>12</sup> Individuals who have only a casual or honorific connection to the organization are not members. Generally the FEC has interpreted the term “member” to apply to any person who either pays membership



dues on at least an annual basis or has a significant organizational attachment.<sup>13</sup>

Individuals must affirmatively accept membership by some action, such as checking a box stating their intention to be members. The affirmation could be satisfied if the member returns a mailed questionnaire or attends an organizational meeting.<sup>14</sup>

**Annual Dues.** Individuals who pay dues at least annually meet the definition of a member.<sup>15</sup> The FEC did not set any minimum amount for dues, allowing organizations to establish their own dues. Because some individuals fail to renew their dues exactly 12 months after the date of their last payment, the FEC offers organizations flexibility in satisfying this provision, as long as members renew their dues within “a reasonable grace period.”<sup>16</sup>

**Organizational Attachment.** Individuals may also be considered members if they have the right to participate directly in organizational governance.<sup>17</sup> This right involves the ability to vote, directly or indirectly, in elections of members for the organization’s highest governing board or on policy questions that are binding on that board.

### Example:

A member of PEN must pay dues of at least \$15 per year. An individual paying these dues qualifies as a member under the FECA and may be solicited by the PAC. PEN also maintains an extensive list of names of people who have written to the organization for information or have had some similar type of contact. These individuals are not PEN members and may not be solicited by the PAC for contributions.

Membership organizations must also satisfy certain requirements:

- some or all of the members must have the power to operate the organization, pursuant to its bylaws or other formal organizational documents;
- membership requirements must be expressly stated in bylaws or other formal organizational documents;
- bylaws or other formal organizational documents must be made available to members;
- the organization must expressly solicit people to become members;
- the organization must expressly acknowledge membership acceptance, such as by sending a membership card or newsletter to the member; and
- the organization may not be organized primarily for the purpose of influencing elections.<sup>18</sup>

### b. What Is a Solicitation?

The FEC has broadly defined the term “solicitation” to encompass almost any oral or written presentation that encourages giving. Solicitation is not just an outright request for funds. The FEC has held, for example, that a newsletter circulated by a connected organization includes a solicitation if it publishes an article about its PAC that promotes the importance of giving and clearly states how people wishing to contribute can do so.<sup>19</sup> The sale of items, such as T-shirts or posters, by a Federal PAC is also considered a solicitation.

While an SSF Federal PAC may lawfully accept *unsolicited* contributions from those outside its solicitable class, publicizing the PAC’s right to accept these contributions is itself a solicitation. It is extremely important, therefore, for the connected organization to evaluate carefully any discussion of its SSF in communications directed beyond its membership or executive and administrative personnel and their families to the public at large. These communications could be deemed impermissible solicitations.

All contributions to a Federal PAC must be voluntary. An organization may *not*, therefore, automatically assess members a political contribution as part of their regular payment of dues. Federal PAC contributions may not be required as a condition of membership. Any contribution guidelines must be simply suggestions, and potential contributors must be informed of their right to refuse to contribute without negative consequences and of their right to contribute more or less than any suggested amount.

**All contributions to a Federal PAC must be voluntary.**

## **8. Accounting and Reporting Responsibilities for Federal PACs**

All Federal PACs are required to keep records of their financial affairs and to make substantial disclosure of those affairs on a periodic basis to the FEC.<sup>20</sup> Political committees must file reports on FEC Form 3X, showing all receipts and disbursements and all outstanding debts and obligations. Receipts include contributions from individuals or other political committees, proceeds of loans received, rebates, and refunds. Disbursements include operating expenditures (if not paid by the connected organization), contributions to federal candidates, and loan repayments. In addition to summary information, the report requires detailed itemization of certain information, such as contributions from individuals and payments to a single vendor that, in the aggregate, exceed \$200. For all contributions of more than \$50 to the Federal PAC, the committee must retain a full-size photocopy or a digital image of the check.<sup>21</sup> No cash contributions in excess of \$100 may be accepted. The treasurer must preserve all records and accounts required under the regulations for three years after the report to which the records relate is filed.<sup>22</sup>

### **a. Filing Deadlines for FEC Reports**

A Federal PAC may choose to file on either a quarterly or monthly basis.

**Quarterly reporting.** If the Federal PAC chooses to file quarterly, reports during a federal election year must be filed by April 15, July 15, and October 15, with the fourth quarterly or “year-end” report due on January 31 of the following year. In addition, the PAC must file a pre-election report 12 days before any election in which the Federal PAC or Super PAC has made contributions or expenditures not previously reported. Finally, the Federal PAC and Super PAC must file a post-general election report 30 days after the general election. There is no requirement for any post-primary election report.

During a nonelection year, a Federal PAC on a quarterly schedule must file only two semiannual reports covering January through June (to be filed by July 31) and covering July through December (to be filed by January 31 of the following year). In addition to these regularly scheduled reports, a PAC may also be required to file reports in connection with special and primary elections.

**Monthly reporting.** Monthly filing involves the filing of a report on the 20th day after the last day of each month during the period from January through September. For the last three months of an election year, in place of the monthly report, the Federal PAC must file the pre- and post-general election reports and year-end reports as described above under quarterly filings. Monthly filing is advantageous if the Federal PAC is planning to support candidates in numerous primary elections or in any special election around the country because monthly filing obviates the need to track the coverage dates and deadlines for pre-primary election reports.

In a nonelection year, a Federal PAC filing monthly files a report by the 20th day after the last day of each month, except for the year-end report covering the month of December, which is due on January 31 of the next year.

In the case of a Federal PAC that has receipts or expenditures (or anticipates having receipts or expenditures) in a calendar year in excess of \$50,000, FEC reports must be filed electronically on or before the date when they are due. All other filers may file

reports on or postmarked by the date on which they are due. If mailed, the reports should be sent by certified or registered mail, express mail, or overnight delivery service with a delivery confirmation so as to have proof of filing.<sup>23</sup> Pre-election reports must be filed on the due date or postmarked on an earlier date specified by the FEC. The FEC takes the position that it cannot waive or extend reporting deadlines, and it strictly monitors filing dates. A late filer may be subject to a civil penalty.

#### **b. Expenditures Must Be Documented**

All Federal PACs must keep detailed documentation of all expenditures, including the name and address of the recipient of each disbursement; its date, amount and purpose; and (if the disbursement is made for a candidate) the candidate's name and office sought.<sup>24</sup> For all expenditures over \$200, it must save a hard copy of the canceled check, invoice or receipt; for credit card transactions, the PAC must keep the canceled check used to pay the credit card bill, plus either the monthly billing statement or the customer receipt for each transaction. These records must be maintained for three years from the date of the report of the underlying contribution and expenditure.

#### **c. Obtaining Contributor Information**

The treasurer of a Federal PAC must exercise its "best efforts" in compiling the information necessary to itemize individual contributions aggregated in excess of \$200 per calendar year. All written solicitations must include a "clear request" for contributor information. The request must be easy to read and clearly visible, and it must include a statement that federal law requires the PAC to use its best efforts to collect and report the name, address, occupation, and employer of all individuals whose contributions exceed \$200 per year. The FEC suggests two statements that meet this requirement, but similar language is acceptable:

- "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation, and name of employer of individuals whose contributions exceed \$200 in a calendar year"; or
- "To comply with federal law, we must use best efforts to obtain, maintain, and submit the name, mailing address, occupation, and name of employer of individuals whose contributions exceed \$200 per calendar year."<sup>25</sup>

Where a contributor fails to provide this information, the treasurer must make at least one written or oral request for this information within 30 days of receipt of the contribution. The additional request may not include any other subject or solicitation and must include a preaddressed return postcard or envelope. The information acquired must be reported in the same election cycle, either on the next FEC report or through amending the report on which the contribution was originally reported. Repeated failure to obtain this information from contributors can result in liability for reporting violations and a civil penalty. *Federal PACs should keep records of its requests for this information.*

An SSF Federal PAC must report any contributor information that is available in the records of its connected organization. Therefore, if the 501(c)(4) has the address, occupation, or employer information in its records, independent of the SSF solicitation, that information must be used in the FEC report.

Note that there is a difference between the recordkeeping and reporting requirements of the FECA. For example, individual contributors are disclosed by name and with accompanying details on FEC reports only if their aggregate contributions exceed \$200 in any year, but the Federal PAC must maintain complete records of the names and addresses of each contributor who has donated in excess of \$50.<sup>26</sup>

**Records must be maintained for three years from the date of the report of the underlying contribution and expenditure.**

**The fair market value of all in-kind contributions made by the SSF Federal PAC must be disclosed.**

#### **d. Reporting “In-Kind” Contributions (Traditional PACs Only)**

The fair market value of all in-kind contributions (donations of goods or services in lieu of cash) made by the SSF Federal PAC must be disclosed. Therefore, if the committee contributes its mailing list to a candidate, the fair market value of the list must be disclosed and counts against the contribution limit to that candidate. Similarly, if the PAC coordinates with a candidate on the production and broadcast of a radio ad advocating the election of that candidate, all the costs of the ad are considered in-kind contributions and must be disclosed.

These costs count against the SSF Federal PAC’s contribution limit to that candidate. The SSF Federal PAC must also notify the candidate benefiting from the in-kind contribution of the nature, amount, and date of the contribution.

In-kind contributions *received by* a Federal PAC are disclosed both as a receipt and as an expenditure on the FEC report so that the value of the in-kind contribution does not affect the cash balance of the PAC.

Super PACs are not permitted to make contributions in federal races, so the rules on in-kind contributions to candidates do not apply.

#### **e. Contribution Limits from PACs to Candidates (Traditional PACs Only)**

SSF Federal PACs are limited in the value of money or in-kind contributions that they may make to candidates. Super PACs may *not* make contributions to candidates, so the guidance in this section applies only to Traditional PACs.

A Federal PAC that has been registered with the FEC for more than six months, has received contributions for federal elections from more than 50 people, and has contributed to at least five candidates qualifies for multicandidate committee status and may contribute up to \$5,000 to each candidate per election (i.e., \$5,000 for the primary election plus \$5,000 for the general election). These limits are not indexed currently to inflation.<sup>27</sup> Traditional Federal PACs that are not multicandidate committees are limited to \$2,600 per candidate per election.<sup>28</sup> Certain limits, including the \$2,600 limit above, are indexed for inflation in odd-numbered years.

Within 10 days of qualifying as a multicandidate committee, a Traditional PAC must also notify the FEC by filing a Form 1M, “Notification of Multicandidate Status.”<sup>29</sup> It must also notify each recipient of a contribution of its status.<sup>30</sup> Most committees comply with this requirement by printing the words, “XYZ PAC has qualified as a multicandidate committee,” on the PAC’s checks. For this reason, you may wish to order only a limited number of preprinted checks during the first six months of the PAC’s existence. The information may also be stated in a cover letter that accompanies any contribution.

Since federal contribution limits are calculated on a per-election basis, the specific election for which a contribution is made should be clearly indicated on the face of the check or in an accompanying letter. It also is essential to indicate accurately on the report whether the contribution is for the primary or the general election. Errors in this area could create the appearance that contribution limitations for a particular election have been violated when, in fact, they have not.

### **C. STATE OR LOCAL ACTIVITY BY FEDERAL PACS**

If a Federal PAC intends to conduct state or local political activity from the same account as its federal activity, it must disclose these expenditures on its reports to the FEC. It will also be required to comply with state and local registration and reporting requirements. Some states permit Federal PACs to make contributions to state and local candidates with minimal if any reporting requirements, while others require the formation of separate State PACs.

Because state laws vary widely, it is advisable to consult with counsel prior to using a Federal PAC for state or local activity. Generally the secretary of state oversees the regulation of these activities, and forms are available from that office. For information on state campaign finance laws, see <http://www.afj.org/for-nonprofits-foundations/state-law-resources.html> and the websites of the Secretary of State or other campaign finance board.

## **D. ESTABLISHING AN SSF THAT IS NOT REGISTERED WITH THE FEC**

The following information applies only to SSFs that are *not* registered with the FEC.

### **1. Registration with the Internal Revenue Service**

An SSF that is not a Federal PAC or a Super PAC and that reasonably anticipates raising or spending \$25,000 or more in a calendar year must register with the IRS within 24 hours after the date on which the organization is established. The 24-hour period is triggered by any one of the following events: obtaining an employer identification number, incorporation of the SSF under state law, approval of articles of association by the board of directors, or the opening of a bank account. The SSF must file Form 8871 (“Notice of SSF Status”) electronically with the IRS. (The link to the electronic filing site is <https://forms.irs.gov/politicalOrgs/login/887xLogin.jsp?ck>, and the instructions for Form 8871 are at <http://www.irs.gov/pub/irs-pdf/i8871>.) This form requires certain basic information, including the name and address of the SSF, date of its establishment, custodian of records, exempt purpose, related entities (which would include the name of the connected organization), and a list of all directors, officers, and highly compensated employees.

The IRS will mail to the SSF a username and password. This will be necessary for electronically amending the Form 8871 or filing periodic reports. (See “Reporting Requirements” below.) An SSF must electronically file notice (an amended Form 8871) of any “material change” to the information on its Form 8871 within 30 days of the material change. A change of address, directors, or bank account would constitute a material change.

### **2. Reporting Requirements**

Periodic reporting is required by the IRS for political organizations that do not report contributions and expenditures to the FEC. An SSF that is required to register with the IRS and does not meet the requirements of a qualified state or local political organization (QSLPO) must file periodic reports with the IRS using Form 8872 (“Political Organization Report of Contributions and Expenditures, available at <http://www.irs.gov/pub/irs-pdf/f8872.pdf>. Instructions are available at <http://www.irs.gov/pub/irs-pdf/i8872.pdf>).

In order to be a QSLPO, a group must meet the following criteria:<sup>31</sup>

- all of the political organization’s exempt function activities are solely for the purposes of influencing state or local elections;
- the political organization is required, under state law, to submit to the appropriate state agency the same information regarding its contributions and expenditures that the political organization would be required to report to the IRS on Form 8872;
- the state agency to which the political organization reports makes the information available to the public, and the organization itself makes the reports publically available upon request; and
- no federal candidate or federal officeholder is involved in the direction or fundraising efforts of the political organization.

For an SSF that is not a QSLPO, Form 8872 requires disclosure of aggregate contributions received and disbursements paid, and detailed information is required for contributions and expenditures.<sup>32</sup> Once the Form 8871 has been filed, the Form 8872 must be filed even if

**Because state laws vary widely, it is advisable to consult with counsel prior to using a Federal PAC for state or local activity.**

there is no activity. An organization must file Form 8872 *electronically* if it has, or expects to have, contributions or expenditures exceeding \$50,000 for the calendar year. No extensions may be granted for filing these reports.

**Quarterly reports.** If the SSF chooses to file quarterly, reports during an election year (i.e., an even-numbered year) must be filed by April 15, July 15, and October 15, with the fourth quarterly or “year-end” report due on January 31 of the following year. In addition to these reports, the SSF must file a *pre-election report* 12 days before an election (primary or general) for which it has made contributions or expenditures not previously reported in connection with that particular election. Finally, the SSF must file a *post-general election report* 30 days after the general election. (There is no requirement for any post-primary election report.)

During a nonelection year (i.e., an odd-numbered year), an SSF on a quarterly schedule must file only two semiannual reports covering January through June (to be filed by July 31) and covering July through December (to be filed by January 31 of the following year).

**Monthly reports.** Monthly filing requires the filing of a report on the 20th day after the last day of each month during the period from January through September. For the last three months of an election year, in place of the monthly report, the SSF must file the pre- and post-general election reports and year-end reports as described above under “Quarterly Filings.” Monthly filing is advantageous if the SSF plans to support candidates in numerous primary elections around the country, because monthly filing avoids the need to track the coverage dates and deadlines for pre-primary election reports.

In a nonelection year, an SSF filing monthly files a report by the 20th day after the last day of each month, except for the year-end report covering the month of December, which is due on January 31 of the next year.

### 3. Obtaining Contributor Information

An SSF must itemize contributions of \$200 or more in the aggregate from any one contributor and aggregate expenditures of \$500 or more. Therefore, it is advisable that an SSF request the name, address, and (if the contributor is an individual) occupation and employer of a contributor in all its solicitations. Similarly, this information must be requested of any entity or individual to whom the organization makes aggregate payments of \$500 or more in a calendar year.

### 4. Fundraising Activities

An SSF that is not registered with the FEC or equivalent state agency is relatively unrestricted with regard to the source and amount of contributions that it may solicit and receive. While an unregistered SSF is generally permitted to accept unlimited contributions from individuals (although not from foreign nationals), corporations, or labor unions, there may be special circumstances that restrict the receipt of certain contributions.

Individuals who make contributions to any political organization exempt under IRC section 527, such as an SSF, should be aware that:

- they may not deduct these amounts as charitable contributions for federal or state income tax purposes;<sup>33</sup>
- such contributions are not subject to the federal gift tax;<sup>34</sup> and
- contributors of stock and other appreciated property must pay income tax on any unrealized gains that they have at the time of the gift.<sup>35</sup>

## CHAPTER IV ENDNOTES

- <sup>1</sup> A 501(c)(3) may establish a separate 501(c)(4) entity, and that 501(c)(4) entity may subsequently establish an SSF for conducting political activities, but the 501(c)(3) may not be involved in supporting the political activities conducted by the 501(c)(4) or the SSF. *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *see also* 2002 CPE Text, *supra* note 17, at 368. A 501(c)(3) may not do indirectly through a 501(c)(4) or SSF any activities that the 501(c)(3) is prohibited from engaging in directly.
- <sup>2</sup> Treas. Reg. § 1.527-6(e); TAM 9622002 (Dec. 13, 1995); PLR 8852037 (Oct. 4, 1988).
- <sup>3</sup> GCM 39837 (May 22, 1990); 2002 CPE Text at 440.
- <sup>4</sup> 11 C.F.R. § 114.1(a)(2)(iii) (2012).
- <sup>5</sup> Treas. Reg. §§ 1.527-6(b)(2) and (3).
- <sup>6</sup> 11 C.F.R. § 114.5(b)(3) (2012); *see also* FEC Advisory Opinion 1983-22.
- <sup>7</sup> *See* 2 U.S.C. § 431(8)(A)(i) (2012) (defining any “loan” to be a contribution).
- <sup>8</sup> *See* 11 C.F.R. § 114.2(f)(2)(i)(B) (2012).
- <sup>9</sup> “Executive or administrative personnel” are defined as employees who are paid on a salary basis, rather than an hourly one, and who have policymaking or supervisory responsibilities. Executives, lawyers, and engineers would be included; professionals represented by a labor union are not included. 11 C.F.R. § 114.1(c) (2012).
- <sup>10</sup> *See* FEC Advisory Opinion 2005-3 (2005).
- <sup>11</sup> 11 C.F.R. § 114.5(a).
- <sup>12</sup> *FEC v. National Right to Work Committee*, 459 U.S. 197, 204 (1982).
- <sup>13</sup> *See* 11 C.F.R. § 100.134(f) (2012).
- <sup>14</sup> 64 Fed. Reg. at 41270.
- <sup>15</sup> 11 C.F.R. § 100.134(f)(2) (2012).
- <sup>16</sup> Definition of “Member” of a Membership Organization, 64 Fed. Reg. 41266, 41270, (July 30, 1999). Although the FEC has not defined the bounds of the grace period, organizations are more likely to satisfy the regulations by making their best efforts to renew members within the 12-month period.
- <sup>17</sup> 11 C.F.R. § 100.134(f)(3) (2012).
- <sup>18</sup> 11 C.F.R. § 100.134(e) (2012).
- <sup>19</sup> *See* FEC Advisory Opinion 1979-13.
- <sup>20</sup> *See* 11 C.F.R. §§ 102.9, 104.14 (2004).
- <sup>21</sup> 11 C.F.R. § 102.9(a)(4) (2012).
- <sup>22</sup> 11 C.F.R. § 102.9(c)(2012).
- <sup>23</sup> *See* 11 CFR § 100.19(b) (2005); *see also* Filing Documents by Priority Mail, Express Mail, and Overnight Delivery Service, 70 Fed. Reg. 13089, 13091 (March 18, 2005) (final rules).
- <sup>24</sup> 11 C.F.R. § 102.9(b)(1) (2012).
- <sup>25</sup> 11 C.F.R. § 104.7(b)(1)(i) (2012).
- <sup>26</sup> 11 C.F.R. § 104.8(a) (2012) (requiring disclosure of each contributor of \$200 or more) with 11 C.F.R. § 102.9(a)(1) (2012) (requiring that an account be kept of the name and address of each contributor of \$50 or more).
- <sup>27</sup> *See* 2 U.S.C. § 441a(c)(1)(B), (C) (2012).
- <sup>28</sup> *See* 11 C.F.R. § 100.5(e)(3) (2012); Federal Election Commission, Contribution Limits

2011-12, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited July, 2012).

<sup>29</sup> 11 C.F.R. § 102.2(a)(3) (2012).

<sup>30</sup> 11 C.F.R. § 110.2(a)(2) (2012).

<sup>31</sup> I.R.C. § 527(e)(5). Even if state law does not require the reporting of the identical information required on IRS Form 8872, an organization may still be deemed a “Qualified State or Local Political Organization” as long as contributions of \$500 or more and expenditures of \$800 or more are required to be reported. Rev. Rul. 2003-49, 2003-1 C.B. 903.

<sup>32</sup> See I.R.C. § 527(j)(3) for the contents of reports required by the IRS.

<sup>33</sup> I.R.C. § 2501(a)(5).

<sup>34</sup> I.R.C. § 2501(a)(5).

<sup>35</sup> I.R.C. § 84(a).



## ABOUT THE AUTHOR

HOLLY SCHADLER is a partner at the law firm Trister, Ross, Schadler & Gold, PLLC. Her practice includes representation of clients on nonprofit tax law, tax litigation, state and federal campaign finance and lobbying laws, and political ethics. She has represented clients in administrative cases before the Internal Revenue Service and the Federal Election Commission.

Ms. Schadler is an author of numerous legal guides and articles for nonprofit organizations, including: *Non-Profit Organizations, Public Policy, and the Political Process: A Guide to the Internal Revenue Code and Federal Election Campaign Act*; *The Effect of Citizens United on Tax and Campaign Laws Governing Tax-Exempt Organizations* (coauthored with, Laurence Gold); “No Free Lunch? The House and Senate Rules for Nonprofit Organizations”; “The Courts Point the Way to Royalty Treatment for UBIT Purposes”; and “Bipartisan Campaign Reform Act of 2002: How Will It Affect Nonprofits?” In addition, Ms. Schadler assisted in the preparation of Alliance for Justice’s publication *Investing in Change: A Funder’s Guide to Supporting Advocacy*. Ms. Schadler has also lectured at numerous seminars sponsored by nonprofit and political organizations on the laws governing lobbying, political activities, and unrelated business income tax.

Ms. Schadler has litigated before the U.S. Tax Court and U.S. Court of Appeals for the Ninth Circuit on behalf of the Sierra Club and other clients, successfully challenging the application of unrelated business income tax to mailing list rental and affinity credit card income.

Prior to practicing law, Ms. Schadler was Associate Political Director of the Sierra Club. She received her law degree from George Washington University with honors and graduated from Vassar College with honors in Eastern European History. She can be contacted at:

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## ABOUT ALLIANCE FOR JUSTICE

ALLIANCE FOR JUSTICE is a national association of environmental, civil rights, mental health, women’s, arts, and consumer advocacy organizations. Alliance for Justice works to secure access to justice for all Americans, strengthen the role of nonprofit organizations in public policy, and foster the next generation of advocates.

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