

Chapter V: Special Rules for Establishing and Operating a Super PAC that is a Nonconnected Committee

THE CONNECTION

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

Third Edition

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CONTENTS

- A. Background on Super PACs 73
- B. Super PAC Structure 73
- C. Establishing and Registering a Super PAC 74
 - 1. FEC Registration 74
 - 2. Employer Identification Number 75
 - 3. Depository 75
- D. Special Accounting and Reporting Responsibilities 75
- E. State Activity. 75
- Chapter V Endnotes. 76

CHAPTER V. SPECIAL RULES FOR ESTABLISHING AND OPERATING A SUPER PAC THAT IS A NONCONNECTED COMMITTEE

A. BACKGROUND ON SUPER PACS

The decision in *SpeechNow.org v. FEC* held that the First Amendment precludes governmental limits on contributions by individuals to political organizations that exclusively undertake “independent expenditures.” Until *SpeechNow.org*, an individual could contribute only \$5,000 per year to a Federal PAC regardless of the kinds of political activities in which the PAC engaged, and individuals were limited to contributing \$117,000 overall to all Federal PACs, candidates, and political parties during a two-year election cycle. Now no limits apply to contributions to Federal PACs that do *not* make contributions but engage *only* in independent expenditures and other public communications. A Super PAC may receive corporate and labor union contributions but is subject to the prohibitions on contributions from foreign nationals, national banks, and federal contractors.¹

As discussed in previous Chapters, Super PACs are required to comply with many of the same rules applicable to all Federal PACs, including registration (see Chapter IV, § B(2) and below), recordkeeping and reporting (see Chapter IV, § B(8)), disclaimers (see Chapter I, § D(7)) and coordination (see Chapter I, § E). There remain, however, many unanswered questions about the organization and operation of Super PACs.

B. SUPER PAC STRUCTURE

A Super PAC may be formed as a Nonconnected Federal PAC. While it is likely that a Super PAC may be an SSF, at the time of publication, there is not definitive guidance on this issue.² To date, the judicial opinions and FEC Advisory Opinions regarding Super PACs have addressed Nonconnected Federal PACs, not SSFs. The FEC has been asked to review a proposed Super PAC established as an SSF of a nonprofit corporation. The Commission, however, was unable to obtain the necessary four affirmative votes to issue a favorable opinion. The key issues on which the Commission was divided are whether the Super PAC could solicit contributions from persons outside of its solicitable class and how to treat the payment by the corporation of administrative and fundraising costs. As long as a Super PAC does not solicit contributions from outside of its solicitable class, there does not appear to be a valid rationale to bar SSF status.

Even in the case of a Super PAC that is organized by a 501(c)(4) and shares officers, office space and staff, there is an alternative approach to forming an SSF that has received FEC approval. The advantage to the nonconnected structure is that the Super PAC is not limited to funding from its restricted class. Instead it may solicit contributions from the general public, as well as corporations, labor unions, and other federally-permissible sources.

The FEC advised the Club for Growth (“CFG”) that it may establish and administer a Nonconnected Super PAC with the same treasurer (who also is the CFG’s president) as its traditional PAC.³ Under this opinion, CFG was permitted to solicit *any* individual to contribute to the Super PAC regardless of whether the person was a member of CFG’s solicitable class. The FEC advised CFG that it *could* solicit beyond CFG’s restricted class and that CFG would not be treated as an SSF. CFG could pay the PAC’s administrative and fundraising costs with those costs treated as lawful (and unlimited) in-kind contributions by CFG to the PAC and reported as such. In contrast, the administrative and fundraising costs of an SSF Federal PAC may be paid by its connected organization, and those payments are *not* “contributions” under FECA.

The payment of administrative and fundraising costs by a corporation for a Nonconnected Super PAC raises an unresolved question regarding the tax treatment of these expenditures under IRC section 527(f). There is currently no tax liability if a section 501(c) organization pays for certain expenses explicitly permitted by FECA, such as partisan engagement with the group's own members and establishing, administering and fundraising for an SSF. The regulations provide that these are expenditures for an exempt function only to the extent provided in the regulations.⁴ The specific regulation covering these expenses, however, is "reserved" and no final decision has ever been made on their treatment. Therefore, while these amounts must be counted in determining the organization's primary purpose, they are not subject to tax if paid by a connected organization for its SSF. If the Super PAC is established as a Nonconnected PAC, however, it is not clear whether the amounts expended by the 501(c)(4) organization in support of the PAC, which are treated as "contributions" to the PAC, would be covered by the reserved section of the regulations or treated as taxable under IRC section 527(f).

Pursuant to a Stipulated Order between National Defense PAC and the FEC, a Nonconnected Federal PAC may maintain two separate bank accounts: one to receive unlimited contributions for independent expenditures only, and another to receive contributions subject to the source and dollar limits applicable to a Traditional Federal PAC for the purpose of making candidate contributions.⁵ Each account must pay the portion of administrative expenses that represents the percentage of activity for that account, and it must comply with the applicable limits for the contributions that it receives for the purpose of making candidate contributions. Therefore, it is no longer necessary to have two separate PACs, one Traditional PAC and the other a Super PAC, as one Nonconnected Federal PAC registered with the FEC may have two accounts established for these separate activities. This order does not apply to SSFs.

C. ESTABLISHING AND REGISTERING A SUPER PAC

1. FEC Registration

A Super PAC is required to file Form 1 with the FEC within 10 days of raising or spending in excess of \$1,000 with respect to federal elections. At least until Form 1 is revised, the FEC requests, but does not require, that, when a Super PAC files Form 1, it attach a letter informing the FEC that it is a Super PAC. The FEC has provided a recommended text for this purpose.⁶ Although this action is optional, it is advisable, because otherwise it is likely that the FEC will generate a form letter to the PAC after the PAC files its first financial report, asking the PAC for clarification on its status. For more information, see http://www.fec.gov/pdf/forms/ie_only_letter.pdf.

A Super PAC that is established as a Nonconnected PAC should not identify a "connected" organization on Line 6 of the Form 1, and the PAC should *not* be identified as a separate segregated fund (Line 5(f)). The Super PAC may, however, include in its name the name of any particular organization that was involved in starting or maintaining it. It appears that in that event the 501(c)(4) should license, for fair market value, to PAC the use of 501(c)(4) name within the PAC's name.

In the case of a Nonconnected PAC already registered as a Traditional PAC with the FEC that wishes to set up a Super PAC account, the PAC should notify the FEC Reports Analysis Division by letter or electronic submission (FEC Form 99) of the intention to start a Super PAC account. This account should use the same EIN and FEC Reporting Number as the Traditional PAC.

2. Employer Identification Number

The Super PAC, unless it is merely an account of an existing PAC, as discussed above, must apply for an employer identification number (EIN) by filing a Form SS-4 with the IRS.

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

3. Depository

The Super PAC 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 Super PAC to receive and spend funds without first depositing them in the depository account.

D. SPECIAL ACCOUNTING AND REPORTING RESPONSIBILITIES

In the case of a separately established Super PAC, the committee must report all of its receipts and disbursements pursuant to the Act and regulations in the same manner as any other federal political committee. (See Chapter IV, § B(8).)

There are special rules for a Federal PAC that maintains both a Traditional PAC account and a Super PAC account (called in FEC guidance a non-contribution account).⁷ In this case, reporting is somewhat more complicated, particularly because contributions received into the Super PAC account must be reported separately from contributions received into the Traditional PAC account. The FEC has instructed that contributions to the Super PAC account should be reported on Line 17 of Form 3X as “Other Federal Receipts,” rather than on Line 11(a), which continues to be used to report voluntary contributions to the Traditional PAC account. Contributions that must be itemized should be described on Schedule A in the memo entry as part of the “Non-Contribution Account.” Independent expenditures made from the Super PAC account should be reported on Line 24 of Form 3X and identified separately on Schedule E by entering “Non-Contribution Account” in the memo text. To the extent that the Federal PAC pays its own administrative or operating expenses, these disbursements should be allocated between the Super PAC account and the Traditional PAC account in a manner that corresponds to the percentage of activity from each account. The disbursements should be reported on Schedule B, Line 29 as “Other Disbursements” and identified in the memo text as for the “Non-Contribution Account.”

E. STATE ACTIVITY

A Super PAC may also make contributions to state and local candidates and undertake public communications about state and local elections insofar as state law permits. In this respect, a Super PAC is just like a Federal PAC. (For that reason, the commonly applied “Independent Expenditures Only PAC” label is somewhat misleading; it is more accurately termed a “no-federal-contributions PAC.”) Given varying state laws, however, it is essential to consult the law of the relevant state prior to using a Super PAC for state or local election activity.

Because Super PACs are a recent development in the law, it is important to consult counsel or knowledgeable sources regarding new rulings or guidance regarding establishing and operating Super PACs.

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CHAPTER V ENDNOTES

¹ *Citizens United*, 558 U.S. 50, 130 S. Ct. 876 (2010); FEC Advisory Opinions 2010-11 and 2010-09.

² FEC Advisory Opinions 2012-1 and 2012-18.

³ FEC Advisory Opinions 2012-18 and 2012-03; 2011-24; 2011-11; 2010-11 and 2010-9.

⁴ Treas. Reg. § 1.527-6(b)(3).

⁵ *Carey v. FEC*, U.S. District Court for the District of Columbia, 11-259-RMC (August 19, 2011), Stipulated Order and Consent Judgment.

⁶ See http://www.fec.gov/pdf/forms/ie_only_letter.pdf.

⁷ See FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (October 5, 2011).

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