

Influencing Public Policy In The Digital Age

The Law of Online Lobbying and Election-Related Activities



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UPDATE

WRITTEN BY ALLEN MATTISON



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Allen Mattison represents nonprofit organizations on tax law, federal and state campaign finance and lobbying laws, and maximizing grant funds for maximum advocacy impact. From establishing corporations and securing IRS tax exemptions, to negotiating contracts and developing options for political activism, he helps nonprofit leaders succeed in all phases of their organizations' lives. Mr. Mattison frequently advises organizations about social media, drawing on his background in political and nonprofit communications. He published one of the first scholarly articles to examine nonprofits' use of social media for advocacy, *Friends, Tweets, and Links: IRS Treatment of Social Media Activities By Section 501(c)(3) Organizations*, 67 Exempt Org. Tax Rev. 445 (May 2011). He received his law degree from Georgetown University Law Center, cum laude, and his bachelor's degree in political science from Washington University in St. Louis with college honors. Prior to attending law school, he was Director of Media Relations at the Sierra Club, and served in various communications roles on political campaigns and on Capitol Hill.

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Alliance for Justice's Bolder Advocacy Program

 Bolder Advocacy



At Bolder Advocacy, we are lawyers, coaches and nonprofit experts with one big goal: to make advocacy easy and accessible for you, the nonprofit and foundation leaders who want to be great fighters for your cause.



Bolder Advocacy is a program of the **Alliance for Justice** — a national association of more than 130 organizations that are united by a commitment to a fair, just, and free America where everyone has equal access to justice and can fully participate in our democracy. Bolder Advocacy equips nonprofits with the knowledge to be confident and powerful advocates. Our staff attorneys conduct workshops and trainings around the country and one-on-one technical assistance by phone and email. Our coaching helps nonprofit leaders become stronger advocates for their missions and empowers them to speak up. Additional information can be found at bolderadvocacy.org.

 **Bolder Advocacy**



Abby Levine is the Director at Bolder Advocacy, A Program of Alliance for Justice.



Social media has transformed the way we consume news, organize our communities, and engage with elected officials.

For example, following the 2020 police killings of Breonna Taylor and George Floyd, millions of individuals learned of the news and expressed their outrage and frustration online. Black Lives Matter and anti-police rallies sprang to life in both the public and online square simultaneously. Activists, organizations, and families turned to digital platforms for news of local events, to assist in mutual aid or policy debates, to make online donations and support Black-owned restaurants and businesses, and to collaborate in real time across thousands of miles.

Likewise, in the decade since our first publication was released and social media was in its infancy, survivors of sexual assault shared their stories online and took the world by storm in a movement that business and elected leaders could no longer ignore by using the hashtag #MeToo, coined by the movement's leader, Tarana Burke. Organizers and organizations have become sophisticated users of social media as well as digital platforms that facilitate online collaboration across multiple organizations and miles.

During the global pandemic, online advocacy saw a rise in the form of digital town halls and video calls with elected officials to keep everyone safe and physically distanced yet connected at the same time. Everyone from foundations to local election officials turned to social media and online resources to encourage voting, dispel election misinformation, check on the status of ballots, watch ballots being counted, and even file lawsuits.

Online advocacy maximizes the way organizations and communities engage in the democratic process, yet it's not always clear how the rules of advocacy apply to online engagement.

This publication was created to address many of the questions nonprofit organizations have about how tax and election laws apply to digital advocacy. While Congress, the FEC, and IRS have begrudgingly begun to acknowledge the internet, they struggle to keep up with the times. However, existing social media platforms such as Twitter and Facebook — as well as newer platforms such as TikTok or Mastodon — are constantly evolving and raising new questions about how to interpret increasingly outdated regulations. We hope this resource lays a foundation for answering those questions.

Alliance for Justice's Bolder Advocacy program has a wealth of experience guiding nonprofits, foundations, and community organizers through the uncertainties and opportunities inherent in online advocacy and electoral activity. This publication complements our other resources and technical guidance, available online, by phone, and occasionally still in-person — public health conditions permitting.

We believe *Influencing Public Policy in the Digital Age* has been updated at a particularly crucial time because in our world of accelerating change and evolving political and policy environments, advocacy matters now more than ever.

Abby Levine

Director
Bolder Advocacy, A Program of Alliance for Justice

Online communications and social media offer nonprofit organizations inexpensive and easy-to-use tools for connecting with members and the public in a more personal way than ever before. These tools can help small groups wield a powerful megaphone previously available only to the largest organizations, and they can enable large organizations to rally the country around issues affecting a particular neighborhood. For community organizers and communications professionals of every stripe, social media has evolved from being a fun adjunct to door-to-door outreach, to becoming a key vehicle for rallying grassroots movements.

When using the internet and social media, however, nonprofit organizations find themselves facing an increasing array of laws and regulations. Even before social media emerged, tax requirements imposed by the Internal Revenue Service (IRS), election restrictions administered by the Federal Election Commission (FEC or “the Commission”), and state laws covering electoral and fundraising efforts could feel overwhelming for nonprofit managers. Internet communications and social media add a dizzying spin to the requirements, as nonprofit organizations try to stay at the cutting edge, with the IRS and other agencies taking years to catch up.

This guide aims to answer the questions nonprofit managers most frequently face regarding the Internet and social media. It begins with an overview of the activities that **three common types of nonprofit organizations** — 501(c)(3)s, 501(c)(4)s, and political organizations tax-exempt under Internal Revenue Code (“IRC”) Section 527 — may engage in. Due to the different natures of these activities, we provide separate explanations of the rules applicable to section 501(c)(3) public charities and those applicable to section 501(c)(4)s and political organizations. We also provide answers to frequently asked questions. Those FAQs are grouped both by organizational type and by social media type, although each section addresses the same FAQs.

Where the IRS or FEC have set rules or have expressed a view on how nonprofits should operate, this guide explains the rule. On questions for which the agencies have not provided pertinent guidance,¹ this guide explains

¹: The IRS issues a variety of types of guidance, some of which carry significant legal weight, and some of which are of virtually no legal significance. Regulations interpret and provide direction on how to comply with laws and carry the most legal value of all IRS guidance. Revenue rulings are official conclusions by the IRS regarding specific factual situations and may have some precedential value in situations matching the exact circumstances in which they were issued. Private Letter Rulings are letters issued to a particular taxpayer, interpreting tax law as it applies to that person or entity’s specific set of facts. These letters may only be relied on by the taxpayer who requested the ruling. Technical advice memoranda are guidance issued by the IRS Office of Chief Counsel to other IRS staff in response to specific technical or procedural issues confronted by those staff members in a particular audit or other proceeding; TAMs are very narrowly applicable and of little legal value. Finally, staff may issue memoranda to others in their department regarding particular issues, but these documents carry no legal weight. More information regarding types of IRS guidance is available [here](#).

Similarly, the FEC issues regulations interpreting federal campaign finance laws and providing users with direction on complying with those laws. The Commission also issues Advisory Opinions (AOs), which are official responses to questions relating to the application of federal campaign finance law to a specific factual situation. An AO offers legal protection only to the requester and a person involved in activity “indistinguishable in all its material aspects” from the activity described in the AO. See 11 CFR § 112.5.

the relevant principles that organizations might apply as they consider how to engage people and accomplish their missions using digital tools. **This guide does not attempt to be comprehensive for all rules applicable to the Internet, social media, and digital outreach.**² Organizations should evaluate their particular situations in consultation with their legal counsel and proceed based on their own tolerance for uncertainty and risk.

As with digital organizing and the internet itself, this guide is an evolving work due to the dynamic nature of the topic. We will prepare periodic updates as the IRS and FEC release new guidance. While we cannot address every technological development, we will add sections when nonprofit organizations find themselves facing new questions. Just as social media provides an opportunity for interaction between organizations and their supporters, so too should this guide; if you face questions that this guide does not address, please let us know so that we may answer the question directly for you and so that we may add it in future versions of this guide. In this guide, the terms **political activity**, **partisan electoral materials**, and **campaign intervention** refer to activities supporting or opposing political candidates or showing a bias toward a candidate.



2: For example, we only touch on the copyright implications of social media, a topic that could fill an entire book. Additionally, this guide is intended to address nonprofits' online activism only; organizations sending commercial email messages, including solicitations for membership, may be covered by federal anti-spam laws and should consult the Federal Trade Commission regulations and their compliance guide for businesses, available [here](#). See 15 U.S.C. § 7702(2)(a); 16 CFR § 316.3, fn. 1. For information regarding text messages and robocalls, see the Alliance for Justice guide, *Robocalling Rules* by Trister, Ross, Schadler & Gold, PLLC (2016) available [here](#).

The term **candidate** is defined broadly for IRS purposes, including not just people who have announced an intention to run for office, but also individuals possibly being drafted as candidates. In addition to covering offices at all levels of government, from U.S. president to the local school board, it also covers non-partisan races such as judicial elections. Importantly, the term includes not just express advocacy messages (that is, messages that explicitly say “vote for” or “defeat” a candidate or that cannot reasonably be interpreted to have any other meaning), but also other activities that tend to help or hurt a candidate's chances for election.³

This guide deals only with federal requirements for nonprofit organizations. In addition to the federal requirements, each state has its own campaign finance laws, regulating organizations' activities related to state and local candidates. In states with ballot issues or referenda, section 501(c)(3) organizations may spend funds to support or defeat those measures (subject to their lobbying limits), without facing any tax consequences, but state law may require the organization to register and report its activity, including, potentially, certain donors.

For section 501(c)(4) organizations, the state law may be aligned with federal law, forbidding contributions but permitting independent expenditures. Or the state law may permit independent expenditures and corporate contributions (i.e., direct monetary contributions or in-kind contributions, such as a 501(c)(4) corporation producing viral videos in coordination with a candidate).⁴ Depending on the state's law, contributions are subject to varying amounts of disclosure and limits. Some states have begun addressing the implications of social media, and more are likely to do so in the coming years. Maryland, for example, requires disclaimers on an organization's Facebook or Twitter page if the page contains express advocacy.⁵ For information regarding campaign finance law in a specific state, see the Alliance for Justice state-law resources page available [here](#).

3: While the IRS has not issued completely clear guidance on what constitutes intervention in a political campaign, Alliance for Justice has provided a more thorough analysis in its publication, *Rules of the Game*, available [here](#).
4: But note that contributions by a section 501(c)(4) organization may be taxable under IRC section 527(f), which imposes a tax on an organization's political spending or its investment income (including interest earned on bank accounts), whichever is less, if either amount is over \$100.
5: See Code of Maryland Regulations § 33.13.07.02, available [here](#).

Overview of Nonprofit Tax and Election Rules ...

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Nonprofit organizations are governed by a broad array of federal tax and election statutes, regulations, and court rulings.



The laws limit — and even prohibit — certain activities for different types of organizations. Generally, these restrictions fall along the lines of lobbying versus educational activities; political versus non-political activities; and communications with an organization’s members versus communications to the general public. This guide examines how three types of organizations⁶ may leverage the Internet and social media to achieve their goals. The three types of organizations are as follows:

501(c)(3) Public Charities and Private Foundations — An organization exempt from tax under IRC section 501(c)(3) is required to devote its resources to educational, religious, scientific, or other charitable activities. Contributions to a 501(c)(3) are deductible from a donor’s federal income tax and are **not** subject to federal gift tax. Public charities may lobby subject to fairly generous limits. Lobbying by a public charity is limited to either an “**insubstantial**” part of its total activity or to lobbying expenditures that could be as much as 20% of its annual budget.⁷

6: For a more thorough discussion of these three types of organizations — including restrictions on their political activities and principles to consider when jointly operating two or more of these entities — see the Alliance for Justice publication *The Connection*, available [here](#).

7: A detailed discussion of the rules governing lobbying by public charities is set out in *Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities*, available [here](#).

Private foundations are subject to a prohibitive tax on lobbying expenditures.⁸ Lobbying includes activities to influence Congress or a state or local legislature, as well as to support or oppose ballot measures. A 501(c)(3), whether a public charity or private foundation, is **strictly forbidden from engaging in any political activity to support or oppose a candidate for political office.**

There is **no exception** for de minimis amounts of activity, so any political activity using a 501(c)(3) organization’s resources will violate the organization’s tax-exempt status. This extends not only to the organization’s official actions (e.g., a post supporting a candidate and appearing on the executive director’s blog), but potentially also to “**unofficial**” activity, such as an employee using her organizational computer and email account during her lunch hour to send messages to friends encouraging them to support or oppose a candidate.

501(c)(4) Advocacy Organizations — An organization exempt from tax under Internal Revenue Code section 501(c)(4) is a social welfare organization that may pursue educational, lobbying, and some limited political activities. A 501(c)(4) may conduct unlimited amounts of lobbying, including working to support or defeat ballot measures. Contributions to a 501(c)(4) are not tax-deductible. Unlike a 501(c)(3), a 501(c)(4) may carry out political activities to support or oppose candidates without jeopardizing its tax-exempt status, as long as it is engaged primarily⁹ in non-electoral activities that promote social welfare. Generally, social welfare means promoting social improvement and civic betterment. Education and lobbying on social and economic issues (including efforts to influence ballot measures) qualify as social-welfare activities, but participation in political campaigns related to candidates **does not.**



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A 501(c)(4) may carry out political activities without jeopardizing its tax-exempt status as long as it is engaged primarily in non-electoral activities that promote social welfare.



8: A detailed discussion of the rules governing private foundations is set out in the AFJ publication, *Investing in Change: A Funder’s Guide to Supporting Advocacy*, available [here](#).

9: No clear test exists for determining when political activity becomes an organization’s primary purpose. One approach is to analyze an organization’s political expenditures compared to its overall budget. For more on the various factors the IRS may consider in determining an organization’s primary purpose, see the Alliance for Justice publication, *The Connection*.

Overview of Nonprofit Tax and Election Rules ...

A 501(c)(4) may, as a secondary activity, engage in partisan political activities without adversely affecting its exempt status. Such activities must comply with federal or state campaign finance law. In some cases, the 501(c)(4) must pay a tax on funds used for political activities.

Political Organizations — Entities organized under IRC Section 527 exist primarily¹⁰ to influence the outcome of elections. These organizations include state and federal PACs, non-PAC political organizations, political parties, and candidates' campaigns. From a tax standpoint, a political organization generally may spend unlimited amounts on political activities and related expenses, but **under state or federal campaign-finance law, it may be subject to limits on how much may be given to each recipient.**

Political activities include influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization. Under federal election law, a 527 is a federal PAC if, in a calendar year, it receives contributions aggregating more than \$1,000 to influence federal elections or makes expenditures aggregating more than \$1,000 to influence federal elections.¹¹ A federal PAC may receive contributions of no more than \$5,000 per donor in a calendar year.¹² Depending on their activities to influence state or local elections, section 527 organizations may need to register with election authorities in various states. State-registered PACs may be subject to contribution limits in their respective states. Online, an organization generally remains bound by these restrictions; the laws governing nonprofit activity reach the web and social media, just as they control other communications channels, such as television, mail, and in-person canvassing. For example, just as a 501(c)(3) may not endorse a candidate at a press conference, the 501(c)(3) also is prohibited from endorsing a candidate on its website.

¹⁰: Section 527 organizations may carry out an insubstantial amount of lobbying, but the entity may be subject to tax on activities that do not further its political purposes.

¹¹: CFR § 100.5.

¹²: There are no limits on contributions to a so-called "Super PAC," that is, a federal PAC that only makes independent expenditures and does not contribute to candidates.



501(c)(3) Guidance

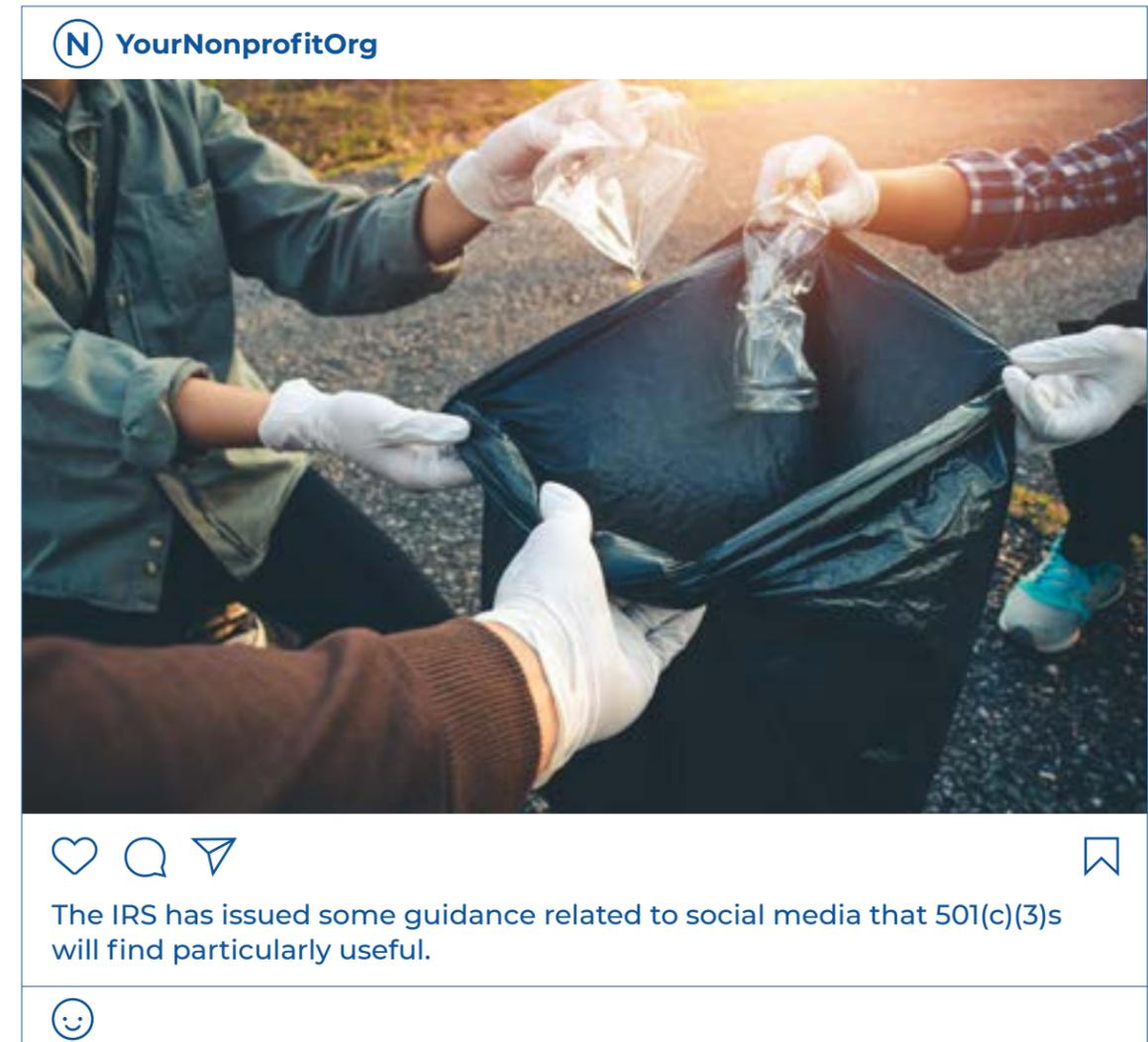


To comply with the IRC section 501(c)(3) prohibition on political campaign intervention, a public charity **must** ensure its website and other online activities do not support or oppose candidates, either directly or indirectly. The IRS has provided some guidance to help section 501(c)(3) organizations determine whether certain online activities might violate their tax-exempt status, but this guidance has been quite limited.

“A website is a form of communication.”¹³ It seems obvious, but this commonsense statement is important because it confirms that the IRS generally treats online activities according to the same principles that guide treatment of an organization’s other communications, such as newsletters, TV ads, magazines, radio talk shows, pamphlets, and telephone calls. In this vein, one can extend other IRS guidance to apply to online activities.



13: Rev. Rul. 2007-41, available [here](#).



These rulings and memoranda indicate that an **organization is responsible for the content on its own website and on the websites to which it links**. But the guidance barely scratches the surface. Recognizing the uncertainty facing nonprofit organizations regarding their communications, the IRS asked for public comment on more than two dozen questions related to online activities by tax-exempt organizations. Organizations responded with thoughtfully considered answers that ran for tens of thousands of pages, but the IRS ultimately left its own questions unanswered.¹⁴

14: See IRS Announcement 2000-84, 2000-2 C.B. 385, available [here](#).

Organization's Own Website



A 501(c)(3) may not use its website to support or oppose candidates, just as its president may not use her position to make speeches supporting candidates and its newsletter may not endorse candidates. If a 501(c)(3) "organization posts something on its website that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements, or broadcasts that favored or opposed a candidate."¹⁵ To illustrate, the IRS provides an example in which a church posts a message on its website urging its members to support one of their fellow parishioners in an upcoming election. By supporting a candidate, the church's message violates its 501(c)(3) status by intervening in a campaign.

Furthermore, **the IRS will examine the context of an organization's website as a whole**, rather than considering whether a particular webpage constitutes political intervention. For example, a 501(c)(3) organization may have engaged in political activity if one part of its website takes a position on an issue, and, on a totally separate part of its website, the organization provides neutral, unbiased information regarding the candidates' positions on that issue.¹⁶

Example: PEN Education Fund, a 501(c)(3) organization, publishes a candidate questionnaire on its website and includes the candidates' full responses to the questionnaire. Using neutral language, the questionnaire asked candidates their position on S.B. 1080, a bill to repeal the Clean Air Act. Elsewhere on the website, PEN Education Fund says S.B. 1080 would be devastating for the environment and people's health, and it says blocking S.B. 1080 is the organization's top priority. The IRS might assert that PEN Education Fund has intervened in a campaign by informing the public where candidates stand on an issue and providing the organization's view of the "correct" position to take on that issue.



¹⁵: Rev. Rul. 2007-41 at p. 11.

¹⁶: Memorandum from Lois G. Lerner, Director, IRS Exempt Organizations Division, April 17, 2008, at 3 (hereinafter "Lerner Memorandum"), available [here](#).



Sharing Website with Related 501(c)(4) Organization



An important issue to note is that a 501(c)(3) organization and its related 501(c)(4) organization **may avoid certain problems** by having separate websites. Under certain circumstances it is possible to do a joint 501(c)(3)/501(c)(4) website. First, if the website is owned by the 501(c)(3) organization, and the 501(c)(4) does not engage in any political activity, the 501(c)(4) may pay to post material on the 501(c)(3)'s website. Second, if the website is owned by the 501(c)(4), and the 501(c)(3) organization pays to post material on the site, that activity may be permissible. However, if the website is owned by the 501(c)(3), and the 501(c)(4) conducts political activity, then political material on the joint website may be attributed to the 501(c)(3), resulting in a violation of the 501(c)(3)'s tax status.

In 2009, the IRS found a 501(c)(3) organization had engaged in prohibited political activity when its website housed pages for its related 501(c)(4) organization.¹⁷ In that situation, the 501(c)(3) organization maintained a website with the 501(c)(4)'s pages nested within that site. The layout and design of all pages on the site were the same. The 501(c)(3) logo appeared on every page of the site; the 501(c)(4) pages also bore the logo of the 501(c)(4) organization. Endorsements of political candidates appeared on the 501(c)(4) pages. Despite the fact that the 501(c)(4) paid a proportionate share of the website costs under a cost-sharing agreement between the two organizations, the IRS found that the 501(c)(3) had engaged in political intervention by hosting the endorsements on the website.

¹⁷: IRS TAM 200908050, available [here](#).

Links to Other Websites

Not only are organizations responsible for the content on their websites, but they are responsible for their web links, according to the IRS. An organization may not use web links in a manner that supports or opposes candidates. **To determine whether a 501(c)(3) is engaging in impermissible political activity by linking from its website to another website, the IRS will look at the context of the organization's link.** If a 501(c)(3) organization links to a 501(c)(4) website that does not include any political content, the 501(c)(3)'s links will not be a problem.

Only in very narrow situations may a 501(c)(3) link to a website with political content. The facts and circumstances considered by the IRS will include, but not be limited to: the language that appears on the 501(c)(3)'s website describing the link; whether the 501(c)(3)'s links treat all candidates equally; whether the link serves a proper tax-exempt purpose (such as nonpartisan public education); and the directness of the links between the organization's website and the webpage containing material supporting or opposing a candidate.¹⁸ The IRS “will pursue the case if the facts and circumstances indicate that the section 501(c)(3) organization is promoting, encouraging, recommending or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues. Again, analysis of the context around the link is a key factor.”¹⁹



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To determine whether a 501(c)(3) is engaging in impermissible political activity by linking from its website to another website, the IRS will look at the context of the organization's link.



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A 501(c)(3) may link to a website with electoral content if there is no indication that the organization is presenting the link because it supports the electoral message, and if the organization's webpage is separated from the electoral content on the other site by a sufficient number of intervening links.



The IRS has not said how many links constitute sufficient separation, but “electronic proximity — including the number of ‘clicks’ that separate the objectionable material from the 501(c)(3)'s website — is a significant consideration.”²⁰

The IRS provides examples of situations where a 501(c)(3) may link to a website with political content:²¹

Content Surrounding the Link — A 501(c)(3) may link to a candidate's website from an unbiased, nonpartisan voter guide that satisfies the IRS's rules relating to voter guides²² if the guide includes all candidates and the links are presented in a consistent, neutral manner, such as including text that reads, “For more information on Candidate X, you may consult [URL].” In this case, the links are provided for a proper tax-exempt purpose — educating voters — without supporting or opposing any candidate.

18: Rev. Rul. 2007-41 at 11-12.
19: Lerner Memorandum at 2.

20: Ibid.
21: Rev. Rul. 2007-41 at 12.
22: See Rev. Rul. 78-248, available [here](#).

“Multiple Clicks” — A 501(c)(3) may link to an educational website, even if the website contains partisan content on another page of the site, so long as the 501(c)(3) is not directing people to the political material. The IRS has not established a safe harbor based on the number of clicks necessary to separate the 501(c)(3) from the political content. By way of example, the IRS says a hospital website may link to a newspaper’s website, even though the newspaper’s website elsewhere includes the paper’s editorial endorsements of candidates, as long as: the hospital is linking to material related to the hospital’s tax-exempt mission (in this case, an article praising the hospital’s treatment program for a particular disease); there are no links from the hospital website to the endorsements; and there is no other context related to the links to indicate the hospital was supporting or opposing any candidate.

After establishing a link, the IRS says an organization has an ongoing duty to monitor it. If an organization links to an external website, and that external website later changes its content to be political, the 501(c)(3) organization may be held liable for conducting political activity, even though the link was permissible at the time it was posted. According to IRS, an organization has a duty to monitor the sites to which it links because the content on those sites may change over time, and the organization must remove its links if the content on that site becomes impermissibly political.

A screenshot of a tweet from a user named 'Nonprofit @YourNonprofitOrg'. The tweet text reads: 'Online political activity by a section 501(c)(4) organization or a PAC will be treated for tax purposes just as political speech in other media is treated.' The tweet includes icons for replies, retweets, likes, and a share button.

It is important to note that the IRS issued a memorandum prior to the 2008 election saying that, “at this time,” it would not pursue enforcement cases involving a link between a 501(c)(3)’s website “and the home page of a website operated by a related section 501(c)(4) organization.”²³ The IRS has not indicated publicly that its position has changed, nor whether the guidance remains in effect. To the extent that the IRS continues to follow the memorandum, this statement is useful because many 501(c)(3) organizations want to link to their affiliated 501(c)(4) organization. It is unclear whether this exception would apply if the 501(c)(4) posts its endorsements on its home page. Some organizations remove any links between a 501(c)(3) website and a related 501(c)(4) website during election seasons, if the 501(c)(4) website touts the organization’s endorsement or provides other election-related advocacy.

23: Lerner Memorandum at 3 (emphasis added).





501(c)(4) and PAC Guidance



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Online political activity by a section 501(c)(4) organization or a PAC will be treated for tax purposes just as political speech in other media is treated.



As the IRS has said, “A website is a form of communication.”²⁴ From a tax perspective,²⁵ a 501(c)(4) may support or oppose candidates to the extent it wishes, so long as political activity does not become the organization’s primary purpose, but its expenditures on political activity may be subject to federal tax. A PAC, on the other hand, may engage in unlimited political activity, with no tax consequences.

A 501(c)(4) with a related 501(c)(3) organization should be sensitive to the restrictions faced by its sibling organization. Importantly, if the 501(c)(4) engages in political activity, the 501(c)(3) organization may face certain risks if the two organizations share a website, as described above. In a case where a 501(c)(3) website housed pages for its related 501(c)(4) organization, and the 501(c)(4) pages endorsed candidates, the IRS attributed the political material to the 501(c)(3) organization that owned the website.²⁶ The fact that the 501(c)(4) paid a proportionate share of the website costs under a reimbursement agreement between the two organizations was not enough to demonstrate to the IRS that the material belonged to the 501(c)(4), rather than to the 501(c)(3) organization.

24: Rev. Rul. 2007-41.

25: While allowed for tax purposes, federal and state campaign finance laws restrict the ability of 501(c)(4) organizations to engage in certain types of political communications.

26: IRS TAM 200908050.

FEC Internet Regulations

Constraints on online political activity for 501(c)(4)s and PACs arise in the context of campaign finance laws. **Corporations, including nonprofit corporations, may not make contributions to federal candidates or to PACs;** although, under the Supreme Court's decision in [Citizens United v. FEC](#), they may spend unlimited amounts on independent expenditures, which are payments for communications that are not coordinated with candidates or their campaigns. PACs, on the other hand, are established specifically for the purpose of making political contributions and expenditures.



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For individuals, bloggers, and organizations, the FEC's internet regulations offered clarity and a measure of freedom.





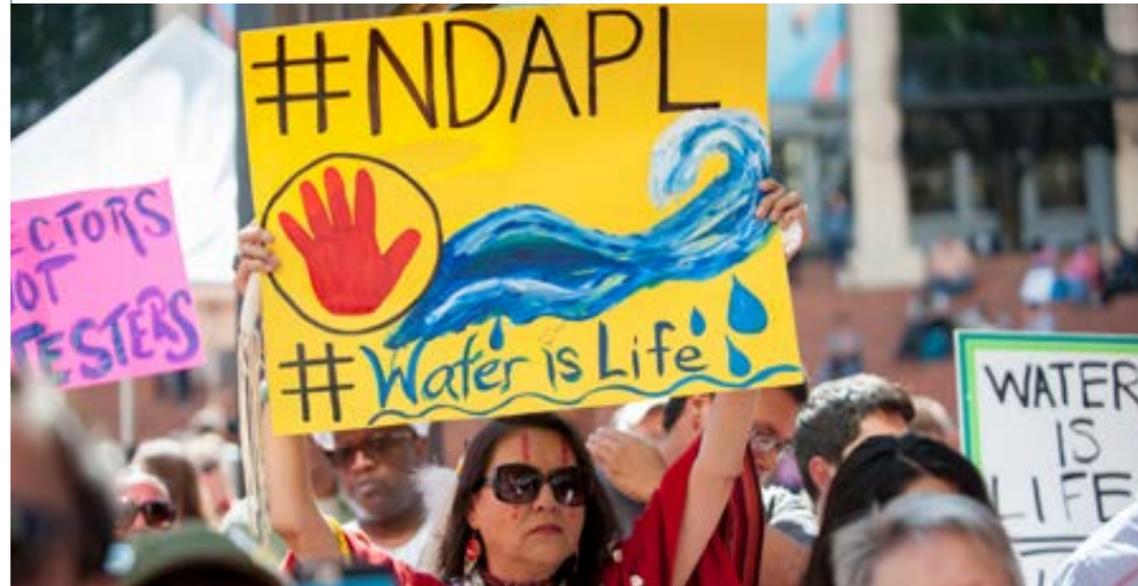
After a decade of issuing advisory opinions piecemeal on internet-related questions, the FEC promulgated internet regulations in 2006. In its rulemaking, the FEC set out “to remove potential restrictions on the ability of individuals and others to use the internet as a low-cost means of civic engagement and political advocacy.”²⁷ The FEC sought to encourage people to use the internet as a vehicle for political communications, likening its low cost to a speaker standing on “a soapbox in a public square.”²⁸

For individuals, bloggers, and organizations, the FEC’s internet regulations offered clarity and a measure of freedom. Federal PACs²⁹ do not receive the same treatment afforded to individuals, bloggers, and 501(c)(4) organizations under the FEC internet regulations. Regardless of the medium, PACs must disclose all of their spending on political activity. Additionally, federal PACs must put disclaimers on all websites they make available to the general public and on all emails containing more than 500 substantially similar messages.³⁰

27: Internet Communications, 71 Fed. Reg. 18589, 18589 (Apr. 12, 2006).
 28: Ibid. at 18596.
 29: Ibid. at 18594.
 30: Internet communications by a nonfederal IRC section 527 organization that does not meet the definition of “political committee” under 11 CFR 100.5 are subject to the rules applicable to internet communications by an IRC section 501(c)(4) organization.

501(c)(4) Internet Communications About Federal Candidates

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Under the Federal Election Campaign Act ("FECA"), 501(c)(4) corporations generally may not coordinate with a federal candidate or a political party on communications made to the general public, as the communication would be treated as an illegal in-kind contribution.³¹



FEC regulations set out a three-part test to determine if a communication is coordinated. As a threshold matter, only "public communications" and "electioneering communications" are treated as coordinated in-kind contributions.³² Neither public communications nor electioneering communications include internet and other electronic communications (such as email), other than ads placed for a fee on another person's website.³³ A non-501(c)(3) corporation may coordinate online communications that are not "public communications" with federal candidates. Due to the consequences of a misstep (i.e., an illegal corporate contribution), and changing FEC positions regarding online communications, organizations should consult a lawyer familiar with federal campaign-finance law before coordinating internet communications with federal candidates.

³¹: 11 C.F.R. § 109.21(c).
³²: Ibid.
³³: 11 C.F.R. § 100.26.





Independent Expenditures



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An independent expenditure is an expenditure for a communication that “expressly advocates” the election or defeat of a clearly identified candidate and is not coordinated with any candidate, a political party, or their agents.³⁴



A communication contains “*express advocacy*” if it uses phrases to urge the election or defeat of a clearly identified candidate, or if the communication as a whole, considering its proximity to an election, could only be interpreted by a reasonable person as urging the election or defeat of a candidate.

Under the FEC internet regulations, no reporting is required when a section 501(c)(4) organization coordinates with a federal candidate on express-advocacy communications placed on the organization’s own website,³⁵ but if the organization posts express-advocacy about a federal candidate on its website and does not coordinate with the candidate, it must file an independent expenditure report when the costs total \$250 per quarterly reporting period.

³⁴: 11 C.F.R. §100.16.

³⁵: The same treatment occurs if the organization posts for free on other online platforms, like, for example, if they post a coordinated video from a candidate to the organization’s Instagram profile.

Resharing Candidate Materials Over The Internet



In general, a 501(c)(4) corporation may not republish, in whole or in part, a candidate's campaign materials.³⁶ For additional details on the republication prohibition, please see the section of the [FAQ on Media Sites](#). It is unclear when resharing (e.g., a retweet or sharing a Facebook post) a candidate's campaign materials over the internet will constitute republication. In 2018, the FEC dismissed a case involving a 501(c)(4) corporation's use of a free Twitter account to tweet a link to a federal candidate's campaign video on YouTube. The First General Counsel's Report recommended dismissal based on the de minimis nature of any expenditure,³⁷ but three Commissioners wrote separately to emphasize their view that regardless of the costs involved, the tweet simply did not constitute republication based on the FEC internet regulations.³⁸

The FEC has dismissed cases of organizations using photographs taken from candidates' websites. In two cases, the FEC Office of General Counsel recommended dismissal because the value of any republication was de minimis; commissioners wrote separately that they believed using a photograph from a website ["as an incidental portion of the document being disseminated"](#) does not constitute republication.³⁹

Beyond downloading a candidate's headshot, FEC commissioners have struggled with instances where candidates have posted video to YouTube for other organizations to incorporate into their own ads. In a series of Matters Under Review (MURs), the commissioners deadlocked on this question, with the Democratic-appointed commissioners holding that the ads were republication, while the Republican-appointed commissioners said that no in-kind contribution had occurred, because the campaigns and the organizations that produced the ads never coordinated with one another.⁴⁰

36: 2 U.S.C. § 441a(a)(7)(B)(iii) and 11 C.F.R. 109.23

37: See MUR 7023, First General Counsel's Report at 16 ("Even if IFA's tweeting of the link to the Committee's YouTube video could fall within the scope of dissemination, distribution, or republication under the Act," the costs associated with the activity were likely de minimis. The video was in all likelihood downloaded at no charge from the Committee's private YouTube channel, and the costs associated with the tweet were likely little or nothing. Therefore, we recommend that the Commission exercise its prosecutorial discretion and dismiss the allegation."), available [here](#).

38: See MUR 7023, Statement of Reasons of Commissioners Hunter, Goodman and Petersen at 5 ("IFA neither received compensation for tweeting 'a hyperlink ... to another person's Web site' nor paid Twitter to disseminate its online posts. Thus its tweet is exempted from the definitions of both 'contribution' and 'expenditure.'"), available [here](#).

39: See MUR 5743, Statement of Reasons of Commissioners von Spakovsky and Weintraub at 4-5 ("The downloading of a photograph from a candidate's website that is open to the world, for incidental use in a larger mailer that is designed, created, and paid for by a political committee as an independent expenditure without any coordination with the candidate, does not constitute the 'dissemination, distribution, or republication of candidate campaign materials.' It is not an 'in-kind' contribution from the committee to the candidate."); see also MUR 5996, Statement of Reasons of Commissioners Petersen, Hunter, and McGah.

40: See MURs 6357, 6617, and 6667.



Volunteer Activity

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Federal law limits the amount of money a person may contribute to a political candidate, but the law allows individuals to spend as much time as they want on personal volunteer activities.



Under the FEC's rules, activity by an individual is not reportable as a "contribution" or as an "expenditure" as long as the person is not compensated for his or her efforts.⁴¹ Just as a person may spend hundreds of hours walking door-to-door encouraging local residents to vote for or against a candidate, a person may engage in unlimited online activity supporting or opposing federal candidates, and their activity will not trigger registration or contribution limits. On their own time,⁴² individuals may set up websites, blogs, and social media accounts supporting or opposing candidates (and may comment on others' blogs or social media posts), send emails, or conduct other activities advocating for or against candidates, and may reproduce materials from candidates' websites. Individuals may coordinate these activities with federal candidates and political parties, and the individuals' costs are not treated as contributions or expenditures. This rule applies regardless of who owns the computer.⁴³

41: See 11 CFR §§ 100.94, 100.155.

42: Additionally, if individuals are paid only a "nominal fee" for blogging or other online activities, their services are not treated as a contribution or expenditure. See 11 CFR § 100.94(e)(1); 100.155(e)(1)

43: Under the tax laws, however, computers for a 501(c)(3) organization may not be used for any political activity, presumably even by employees on lunch breaks or after work hours.

In addition, these exceptions extend to groups of individuals who have decided to incorporate for liability purposes so long as the corporation: (1) is wholly owned by one or more individuals; (2) engages primarily in Internet activities; and (3) does not derive a substantial portion of its revenues from sources other than income from its internet activities.⁴⁴

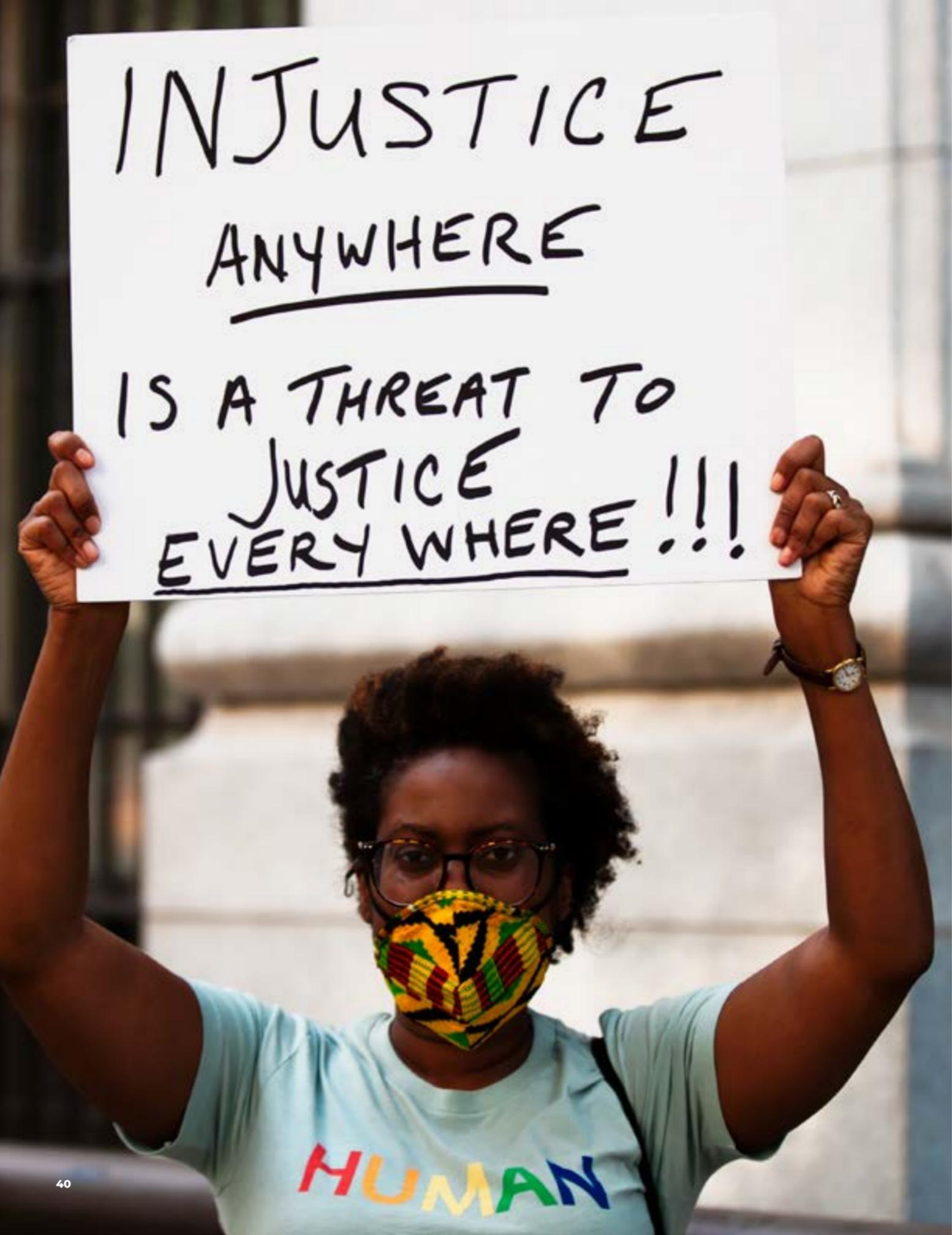


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The FEC's internet regulations allow employees of a corporation to make "occasional, isolated, or incidental" use of corporate computers (as well as other equipment and facilities) to conduct individual volunteer activity in connection with a federal election.



44: 11 CFR §§ 100.94, 100.155.



Use of Organization's Computers and Equipment

...

A section 501(c)(4) nonprofit corporation may not allow its property — including its computers — to be used to support a federal candidate if the activity would be a prohibited in-kind contribution to the candidate.⁴⁵ However, the FEC's internet regulations allow employees of a corporation to make “occasional, isolated, or incidental” use of corporate computers (as well as other equipment and facilities) to conduct individual volunteer activity in connection with a federal election. The employee's time will not be considered a contribution by the organization, nor will the corporation's decision to allow its equipment to be used for such purposes.⁴⁶

“Occasional, isolated, or incidental” means the employee's use during or after working hours does not prevent the employee from completing his or her normal amount of work. Furthermore, the corporation may not condition the availability of the equipment on its being used for political activity, or on support for or opposition to any particular candidate or political party. There is no limit on the number of hours an employee may engage in individual political activity on the internet,⁴⁷ so long as:

1. The employee completes the normal amount of work that person is paid for or is expected to perform;
2. The use does not increase the overhead or operating costs of the corporation; and
3. The employer does not coerce the employee into performing the activity.⁴⁸

Some states may follow a similar rule, so non-501(c)(3) organizations should consult state law to determine whether employee use of work computers will result in a corporate contribution.

The FEC treats paid online advertising just as it does TV or radio ads.

45: Note, however, that a nonprofit corporation exempt from tax under section 501(c)(4) may use its resources to make unlimited express advocacy communications with its members or executive or administrative personnel, and those payments are not considered contributions or expenditures. See 11 CFR §§ 100.134, 114.1(a)(2)(i). Also, a 501(c)(4) organization — but not a 501(c)(3) — may use its property for independent expenditures, provided those activities are conducted independent of any candidate or campaign. See *Citizens United v. FEC*, 558 U.S. 50 (2010); IRC § 501(c)(3).

46: Keep in mind, though, that tax law prohibits political intervention by 501(c)(3) organizations; the fact that the FEC permits occasional use of a corporation's computer does not enable a charitable organization to get around the IRS prohibition for 501(c)(3)s.

47: In contrast, the safe harbor for non-internet-related activities is limited to one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours. See 11 CFR § 114.9(a)(1).

48: 11 CFR § 114.9(a)(2)(ii).

Paid Online Ads

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Paid internet advertising includes banner ads, pop-up ads, paid streaming video, boosted social media posts, and directed search results.



The FEC's laxity regarding internet communications extends only to free use of websites and social media; the FEC treats paid online advertising just as it does TV or radio ads. "Communications placed for a fee on another person's website" are subject to disclaimer requirements similar to those imposed on TV and radio ads.⁴⁹ This treatment is consistent with the philosophy of the FEC's Internet regulations: Just as the FEC decided not to regulate free online speech akin to a soapbox speechmaker, it analogizes paid online advertising to purchases of TV airtime.⁵⁰

49: See 11 CFR §§ 100.26, 110.11.
50: 71 Fed. Reg. at 18590.

This Means:

1. The costs of a paid ad on the internet that expressly advocates the election or defeat of a federal candidate must be paid for by a permissible source, such as a federal political committee (PAC) or an individual other than a foreign national. Corporations (other than 501(c)(3)s) and labor unions may pay for them only if they are not coordinated with candidates or political parties.
2. Ads paid for by a corporation as an independent expenditure must include a disclaimer with the corporation's name and a statement that the ad is not authorized by any candidate or candidate's committee.
3. If a federal PAC purchases an ad on a website, the ad must have a disclaimer indicating the committee's name, address, and whether or not the ad is authorized by a candidate or candidate's committee. In the online realm, the FEC generally has not granted exceptions based on space limitations.⁵¹

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51: See, e.g., FEC AO 2017-05 ("Great America PAC"); but see FEC AO 2002-09 ("Target Wireless" granting limited exception for character-limited text messaging); see also FEC AO 2010-19 ("Google AdWords" permitting conduct described in request, but with commissioners failing to approve a rationale).



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to call us with questions.

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