

## Guidance on Non-Connected Political Action Committees

Under the federal campaign laws, corporations—including non-profits—are prohibited from making contributions to federal candidates. In *Citizens United v. Federal Election Commission*, the Supreme Court struck down the prohibition on corporations making independent expenditures to influence federal elections, but the court left the ban on corporate contributions to candidates intact.

An exception to the prohibition allows a corporation to pay the establishment, administrative, and fundraising costs of a separate segregated fund. A separate segregated fund—commonly called a “connected” political action committee (PAC)—can raise voluntary contributions only from a limited group of company executive and administrative personnel, as well as shareholders.

Notwithstanding this allowance, under the Internal Revenue Code (IRC), a charitable hospital exempt from taxation under section 501(c)(3) of the IRC is prohibited from participating in “any political campaign on behalf of or in opposition to any candidate for public office.” This prohibition has been widely interpreted to mean that a 501(c)(3) hospital may not establish a separate segregated fund—a connected PAC—for its employees. The Internal Revenue Service (IRS) has, however, recognized that individuals associated with or employed by a 501(c)(3) hospital may participate in campaign activities in their personal capacity under certain circumstances.

Occasionally, individuals associated with a charitable hospital will ask whether they may, independently of the hospital, establish a non-connected PAC to support federal candidates without jeopardizing the tax-exempt status of the hospital. Generally speaking, an individual may be able to establish a non-connected PAC, subject to certain requirements.

Note that this brief is intended as a reference guide and does not constitute legal advice or represent or otherwise address all applicable authority and guidance on non-connected PACs. You should consult the relevant laws, rules, and standards of conduct—or engage legal counsel and/or compliance personnel—should you have any questions about activities in connection with a specific situation.

### Formation of a Non-Connected PAC

As its name indicates, a non-connected PAC is not connected to any corporation or labor organization. Unlike a separate segregated fund, a non-connected PAC may solicit contributions from anyone in the general public who may lawfully make a contribution in connection with a federal election. On the other hand, Federal Election Commission (FEC) regulations prohibit a non-connected PAC from having a “connected organization” establish, administer, or raise money for the non-connected PAC. Instead, a non-connected PAC generally must pay for its own establishment and operational expenses.

Should an individual associated with a Children’s Hospital Association<sup>1</sup> (CHA) member hospital choose to establish a PAC, he or she must ensure that the PAC is not actually a separate segregated fund—i.e., a connected PAC—of the hospital. In the past, the FEC has looked at certain factors in considering whether a non-connected PAC is truly independent, including:

- the financial independence of the non-connected PAC—i.e., whether the non-connected PAC receives financial support or other support from the hospital
- the role employees or individuals associated with the hospital play in the creation and operation of the non-connected committee

While the above factors are discussed in more detail below, it is important to note that there is a dearth of guidance that provides a clear picture on the level of separation necessary to ensure that a non-connected PAC maintains its status as a non-connected PAC.

### **1. Financial Independence**

If individuals otherwise associated with a hospital organize a non-connected PAC in their personal capacities, those individuals must maintain strict financial and organizational separation between the PAC and the hospital. Any apparent financial support provided—directly or indirectly—by the hospital to the non-connected PAC would place the non-connected PAC in jeopardy of being deemed a separate segregated fund, i.e., a PAC connected to the hospital. Steps that could help a non-connected PAC demonstrate financial independence may include:

- Ensuring that the initial costs of organizing the PAC are paid for by the individual organizers as in-kind contributions to the PAC or from other funds raised by the organizers, and that no hospital funds are used for this purpose. Ensure that all operational expenses are paid from in-kind contributions or the funds raised by the PAC.
- Ensuring that the PAC does not conduct solicitations or efforts to educate others about the PAC on hospital premises or otherwise engage in efforts that could imply any hospital connection—hospital letterhead or other identifying materials should not be used. Ensuring that no discussions regarding the PAC are conducted during official staff meetings or other hospital functions.
- Ensuring strict separation of office space, staff, supplies, and other resources are maintained to in a manner that ensures that the PAC is paying its own way and not benefiting in any manner from the resources of the hospital.
- Ensuring that the PAC does not use non-public or proprietary information from the hospital. For example, the committee should not obtain or use a list of hospital employees or suppliers unless the list is publicly available or is made available to other groups on a similar basis.

### **2. Operational Independence**

A non-connected PAC should govern itself in such a way as to ensure its operational independence from the hospital. If a non-connected PAC is found to be controlled by or maintained by the hospital, the non-connected PAC risks becoming the hospital’s separate segregated fund. Steps that could help a non-connected PAC demonstrate operational independence may include:

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<sup>1</sup> The Children’s Hospital Association’s legal name is the National Association of Children’s Hospitals.

- Ensuring the individuals establishing the non-connected PAC operate in their individual capacities, not as agents of the hospital, and that no individual uses his or her title at the hospital when working on behalf of the non-connected PAC or makes any suggestion that he or she is acting on behalf of the hospital or with the hospital's acquiescence.
- Ensuring that the non-connected PAC's name does not contain any reference to the hospital.
- Ensuring that the non-connected PAC has bylaws which require that the governing board be composed of a broad array of individuals, not restricted only to those associated with the hospital or any of its affiliates. While individuals associated with the hospital, such as those who are employed by or who serve as trustees of the hospital, may be on the non-connected PAC's board, they generally should be a minority of board members.
- Ensuring that the bylaws do not require mandatory board participation by hospital employees or affiliated persons. Ensuring that the board seats occupied by hospital employees or affiliated persons have no rights or authorities that differ from those of other board members.
- Ensuring that the officers of the non-connected PAC are comprised of an array of individuals, not just hospital employees or affiliated persons.
- Ensuring that the bylaws state that the non-connected PAC will be governed and operated independently of the hospital or its affiliates.
- Ensuring that the non-connected PAC does not conduct any joint fundraising with the hospital.
- Ensuring that fundraising and education efforts are not be conducted at hospital functions.
- Ensuring that solicitations for contributions are not limited only to those associated with the hospital and extend to the public at large.
- Ensuring that no hospital staff, facilities, equipment, or supplies—such as stationery or other materials—are used.

The FEC reserves the right to examine whether a non-connected PAC is truly operating independently. For example, the FEC has recognized that the initial organizers and supporters may be closely associated with—in this case, the hospital—but has determined that there needs to be a successful effort to expand the operational control and financial support to persons in the community other than hospital employees or affiliated persons.

### **Hybrid PACs**

The U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, and the subsequent federal court decisions and FEC advisory opinions and guidance publications issued to implement the decision, resulted in the creation of new types of political committees that present new alternatives for individuals and entities wanting to be politically active.

Super PACs, for example, are committees authorized to make only independent expenditures<sup>2</sup>; they are not authorized to contribute directly to candidates, campaign committees, or political parties. Corporations and labor organizations are now permitted to make an unlimited amount of independent expenditures themselves, contribute an unlimited amount of corporate funds to Super PACs, and sponsor Super PACs that may raise an unlimited amount of corporate funds.

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<sup>2</sup> An independent expenditure is not a political contribution to a candidate's campaign. Instead, it is an expenditure made for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, their agents, or a political party or its agents. The decision to act independently of any candidate or political party is critical.

A Super PAC, therefore, provides significantly greater expenditure and fundraising potential because of the lack of expenditure limits and the ability to raise an unlimited amount of funds; however, a Super PAC cannot be used to contribute directly to a candidate or his/her campaign, and a 501(c)(3) cannot establish a Super PAC for the same reasons that it cannot establish a separate segregated fund/connected PAC.

A Hybrid PAC, however, is a new form of a non-connected PAC that may be appealing to individuals associated with a CHA member hospital wishing to make both political contributions to candidates and independent expenditures, in each case, independently of the hospital.

In *Carey vs. Federal Election Commission*, the National Defense PAC, a non-connected PAC, sought to use separate bank accounts to operate as both a traditional non-connected PAC and as a Super PAC. The court's decision allows non-connected PACs to open separate bank accounts to accept unlimited contributions to fund independent expenditures—an "independent expenditure-only" account—and contributions to be used for political contributions directly to candidates or their campaigns—these contributions are subject to normal FEC limits.

Non-connected PACs that establish independent expenditure-only accounts have come to be referred to as Hybrid PACs. The FEC has issued a statement implementing the Carey decision and providing specific instructions for non-connected PACs that wish to maintain a separate independent expenditure-only account.