



MEMORANDUM

Chairman and Founder
RICHARD A. VIGUERIE

TO: Key Conservatives

President & CEO
KATHLEEN PATTEN

FROM: Richard A. Viguerie

President of Corporate
Affairs
MARK FITZGIBBONS

DATE: May 13, 2019

Chief Financial Officer
STEPHEN D. PECK

RE: 15th Marketing Memo for Conservative Leaders

Vice Presidents
KEVIN ALLEN
RICK ANDERSON
LUANN PETERSON
VI SHIELDS
DAVID TARGONSKI

SUBJECT: Do's and don'ts of election/advocacy/fundraising laws—you can probably do a lot more than you're doing

Senior Copywriters
TOM CARCHIA
SUSAN DONER (Sr. Vice President)
GEORGE GETZ
BEN HART (Sr. Vice President)
JIM PICONE (Sr. Vice President)

In this my 15th Marketing Memo for Conservative Leaders, I've asked Mark Fitzgibbons whom many if not most of you know from CNP or his writings about the law and freedom, to provide some guidance that he provides me and our team about laws that affect fundraising and marketing.

Account Executives
MARY ANN PAUGH
TOD STEWARD
CRYSTAL TRUPIA

Laws governing our speech, press rights, rights of association, and even religious rights seem intimidating—well, because they're written by incumbents to protect their political power, enforced by the administrative state that is threatened by our principles of small government and limited power for statist, or manipulated by leftist state attorneys general who are outright hostile to our missions.

Vice President of
Sweepstakes Division
FRANK DORNER

Leftists are masters at detailed regulation, and Mark's memo on the law sometimes references what leftist nonprofit organizations write as a good guide to what conservatives should do when it comes to the legalities of political speech.

American Mailing Lists
Corporation
President
DOROTHY MILLER

Many liberal 501(c)(3) organizations, such as the ACLU, are spending tens of millions to attack Republicans.

SPECIALIZING IN
4 Horsemen (Position, Differentiation,
USP/Benefit, Brand)
Building Large Housefiles Quickly
Digital Fundraising
Direct Mail Fundraising
Grassroots Lobbying
High Dollar Fundraising
Internet Marketing
Lifetime Value of a Donor
Sweepstakes
Video (DVD) Marketing

Also, I'd like to emphasize that most conservative pastors and priests have been hesitant to write or say things from the pulpit for a fear of violating the law and endangering their tax status.

However, for decades liberal pastors/priests and Democrat politicians have spoken about public policy issues from the pulpit, and sent forth the parishioners with the clear (but not spoken) understanding they were to campaign and vote for Democrats.

Let's encourage conservative religious leaders to be more bold and outspoken while not violating Caesars' laws.

For the rest, I turn it over to Mark ...

**A Memo for Conservatives about
Laws Affecting Communications, Fundraising,
And Growing Your Donor Base**

Mark. J. Fitzgibbons
President of Corporate Affairs
American Target Advertising, Inc.
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This memo is intended to provide some perspective about laws governing fundraising and advocacy. This is not legal advice. Nor, of course, should this memo be the only study guide you use.

Richard Viguerie’s memos have been telling you about the need and opportunities of conservative organizations to increase their donor files, their fundraising, and their impacts on America between now and the 2020 Elections – and how to achieve those things. Just as when you drive you need to know the speed limits where you’re driving, this memo is designed to give you some sense of the rules to get you where you’re going -- on time, and without being pulled over by the “speech police” regulators.

Despite the First Amendment’s protecting fundraising as educational, informative, and even persuasive speech, the regulations for fundraising and communications by nonprofit organizations are complex -- especially when electoral politics may be involved. I cannot adequately teach you in this memo what tax-exempt or campaign finance lawyers constantly study and debate, what general practice lawyers may learn in a two-day course, what I have taught in a three-hour course, or all that American Target Advertising teaches and requires of its direct marketing professionals -- even on a daily basis.

But maybe this memo will help you know when you can drive faster – and when you should slow down or even come to a stop, or when you should ask experts more probing questions. For those who want to dig in beyond the scope of this very limited memo, you can go to this link <http://americantarget.com/fundraisinglaw.pdf> and read a very condensed version of a memo about the law that I have prepared for ATA’s copy writers.

Three Major Types of Entities – Three Different Ways to Affect Politics and Policy

The three types of entities that are probably used most to engage in advocacy are 501(c)(3)s, 501(c)(4)s, and political action committees (PACs). This memo won't focus on all PACs, but just Independent Expenditure PACs, which may expressly advocate for the election or defeat of candidates, but which may not raise money to transfer to candidates or party committees.

C3s. We know that C3s may not engage in partisan politics, but that does not mean they must refrain from discussing issues in the political arena. For example, C3s may be used for voter registration, get out the vote (GOTV), and even hosting candidate debates, but such activities may not be used to favor one candidate or group of candidates.

C3s may be very useful in exposing bad actors in politics and public policy (what C3s like Judicial Watch do), addressing good and bad public policy (e.g., Heritage Foundation), and litigating (e.g., Alliance Defending Freedom, Americans United for Life).

Although we are seeing two systems of justice – one protecting statist, the deep state, and their leftist allies, while being harsher on the rest of us – I recommend watching what leftist organizations do to fit within the boundaries of what are acceptable “politics” for C3s. C3 organizations like Media Matters are heavily “political.” The ACLU uses its website to attack President Trump. See what the ACLU says about President Trump:

Since President Trump was sworn in on Jan. 20, 2017, the ACLU has been at the forefront of efforts to push back against the administration's unconstitutional and un-American threats to civil liberties and civil rights.

Just days after the 2016 election, we made a promise to President-elect Trump and our supporters that we would stand up to him should he try to follow through on any of the unconstitutional proposals he made as a candidate. Since then, the ACLU has doubled down on its

commitment, championing important litigation and launching a new grassroots organizing platform.

We have taken 119 legal actions — and counting — since President Trump took his oath of office. Here are just some of our major accomplishments since President Trump's inauguration one year ago.

<https://www.aclu.org/issues/executive-branch/donald-trump-year-one>

The key to what C3s may do is to avoid discussing politicians in the context of elections, and instead discuss policy.

One of the most effective fundraising techniques that C3s may use to engage donors and potential donors is the survey. Surveys are easily written in non-partisan political ways, but nevertheless bring focus to issues and even politicians.

A Special Word for Religious Leaders.

I strongly recommend you read the “Politics and the Pulpit Election Articles Series” by one of my heroes, Fr. Frank Pavone of Priests for Life, found at this link:

<https://www.politicalresponsibility.com/elecarticles.htm>. In “Part Two: The IRS is Not the Law,” <https://www.priestsforlife.org/columns/4896-politics-and-the-pulpit-part-two-the-irs-is-not-the-law> he writes, “So many pastors and their congregations are under the impression that they are going to ‘violate the law’ if they distribute a voter guide or preach about the urgent importance of voting pro-life. Nonsense, and it's time we start saying so. This series of columns will tell you why.”

Richard Viguerie and I wrote an e-book entitled “The Law That Governs Government,” which is about the Constitution. In it we write that government is America's biggest lawbreaker, with no close second. While it is extremely important to follow the law, we should keep in mind that misinterpretations of the civil laws that govern our speech, religious, and other constitutional rights may harm our liberties and our callings to do what's right under God's law. Government officials are periodically if not often wrong or even lawless in their interpretations of their power, and should be questioned and challenged.

C4s. These are what are called “social welfare” organizations, and unlike C3s are not barred from political activities. The C4 must comply with the “primary purpose” test, however, meaning that less than a majority of the organization’s activities may be political.

C4s may engage in unlimited lobbying, because that is not deemed “political.” Therefore, C4 fundraising materials may include grassroots petitions to Congress on specific legislation, and efforts to influence voting on judges and Senate-confirmed appointments.

Again, because the left relies so much on nonprofit organizations, some of the better written materials about the rules come from them. Here is a link to Bolder Advocacy’s relatively detailed explanation of lobbying and political activities for C4s for those who wish to study further:

https://www.bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_Ch1_paywall.pdf

Independent Expenditures by C4s. An “independent expenditure” is a communication expressly advocating the election or defeat of a candidate or candidates. C4s may issue these political communications, but they are considered in determining the threshold for the “primary purpose” test, meaning they are counted towards the percentage of activities that are political, versus purely “social welfare.”

And even though a C4 isn’t considered a “political committee” that must register with the Federal Election Commission, C4s that make independent expenditures nevertheless must report them to the FEC.

Independent Expenditure PACs. IE PACs may communicate messages of “express advocacy” to elect or defeat candidates. They are tax-exempt under Internal Revenue Code section 527. Unlike C3s and C4s, IE PACs do not need to obtain authority from the IRS to operate, but they are obligated to file annual returns with the IRS. IE PACs also do not register under state charitable solicitation laws when raising money. IE PACs are required to register with the FEC under the IE PAC designation.

IE PACs must file reports with the Federal Election Commission, and must report donors of over \$200 (that is cumulative, so someone donating \$100, then \$150 in that cycle must be reported). Besides the quarterly (or monthly) reports and annual reports, IE PACs are subject to more immediate reporting requirements (known as the 48-hour and 24-hour reports) in the period immediately preceding elections in which they make expenditures.

The FEC provides the following guidance about independent expenditures (<https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/>):

An independent expenditure is an expenditure for a communication, such as a website, newspaper, TV or direct mail advertisement that:

Expressly advocates the election or defeat of a clearly identified candidate; and

Is not made in consultation or cooperation with, or at the request or suggestion of a candidate, candidate's committee, party committee or their agents.

Clearly identified candidate

A candidate is "clearly identified" if the candidate's name, nickname, photograph or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," "the Democratic presidential nominee," "the Republican candidate for Senate in the State of Georgia."

Express advocacy

"Express advocacy" means that the communication includes a message that unmistakably urges election or defeat of one or more clearly identified candidate(s). There are two ways that a communication can be considered

express advocacy: by use of certain “explicit words of advocacy of election or defeat” or by meeting the “only reasonable interpretation” test.

Explicit words of advocacy of election or defeat:

The following words convey a message of express advocacy:

"Democratic nominee," "cast your ballot for the Republican challenger for the U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '18";

Words urging action with respect to candidates associated with a particular issue, e.g., "vote Pro-Life"/"vote Pro-Choice," when accompanied by names or photographs of candidates identified as either supporting or opposing the issue;

"Defeat" accompanied by a photograph of the opposed candidate, or the opposed candidate's name, or "reject the incumbent"; and

Campaign slogan(s) or word(s) that in context can have no other reasonable meaning than to support or oppose a clearly identified candidate, for example, posters, bumper stickers and advertisements that say "Nixon's the One," "Carter '76," "Reagan/Bush."

"Only reasonable interpretation" test:

In the absence of such "explicit words of advocacy of election or defeat," a communication expressly advocates when, taken as a whole and with limited reference to external events, such as the proximity to the election, it can only be interpreted by a "reasonable person" as advocating the election or defeat of one or more clearly identified candidate(s).

This test requires advocacy of a candidate that is unmistakable, unambiguous and suggestive of only one meaning (that being the election or defeat of a candidate).

Note that the author's intent is irrelevant. The test is how a "reasonable" receiver of the communication objectively interprets the message. If reasonable minds could not differ as to the unambiguous electoral advocacy of the communication, it is express advocacy regardless of what the author intended.

Miscellaneous Helpful Hints.

1. State charitable solicitation laws mandate certain disclosures in your fundraising materials. Comply, of course, but you may also wish to preface that section of your fundraising materials with a brief, positive statement about your organization. (What I say is never let compelled government speech be wasted on just compelled government speech. Use the opportunity to market your cause too.)

I also recommend adding the following type of language so donors don't assume their gifts to mass solicitations are restricted to specific projects or uses:

Your generous donation is used for our tax-exempt mission, which may include educating the public, administrative, compliance and fundraising costs.

2. Photos and graphics are very important to good fundraising materials. My condensed copy writers memo, linked here <http://americantarget.com/fundraisinglaw.pdf>, provides some very basic but useful information about copyrights, the doctrine of fair use, and rights of privacy that every organization should know to avoid copyright infringement lawsuits, or suits for using images of individuals implying their consent to your mission.

3. Train your staff about fundraising law and data security. The first thing I tell new ATA employees is do not use email recklessly, and never use it to discuss legal matters. The example I use is Arthur Andersen – once the largest firm in the world – was put out of business because of **one email**. That internal email asked a question about

document retention and destruction policies. The Department of Justice prosecuted Arthur Andersen claiming that email show intent to destroy evidence during the Enron investigation. The Supreme Court later ruled unanimously in favor of Arthur Andersen, but it was too late. The firm was out of business, and thousands of people lost their jobs – all over one email.

Regulators may demand, obtain, and inspect your documents, including your emails, without “probable cause” that a law was violated, and without judge approval, by issuing administrative subpoenas, otherwise known as civil investigative demands. Anti-conservative regulators can be very creative in using false and damaging interpretations about emails that are poorly or inartfully written, and have unintended legal consequences.

4. Proper tax deductibility disclosure. Be sure your fundraising materials clearly disclose that contributions are deductible (C3s) or not deductible (C4s and PACs). Since donations to C3s are tax deductible, this is a benefit to donors that you may wish to stress in the text of your solicitations, and not just in your government-mandated disclosure sections. But when soliciting non-deductible contributions for C4s or PACs, don’t try to hide that fact on your donation pages with font that is too small. And for Independent Expenditures, be sure to use the FEC-required disclosure.

Again, use compelled government disclosure to weave in good things about your organization. For example, following the required disclosure for independent expenditures, consider adding your organization’s tagline:

Paid for by XYZ organization
www.XYZ.org

Not authorized by any candidate or candidate’s committee

XYZ organization: America’s largest grassroots organization
advocating against Socialism