

## FROM THE EDITOR

## Federal Election Law Considerations for Electric Cooperatives

*This month's editorial was written by Jessica Tiaht, NRECA Member Counsel, and is part 2 of a 2-part series.*

### Use of Cooperative Facilities and Staff Time

A campaign contribution is defined as money or "anything of value" given in connection to a federal campaign.<sup>1</sup> When a political action committee (PAC) provides goods or services for the benefit of a campaign, the amount spent is reported as an "in-kind contribution."<sup>2</sup> Although cooperatives are prohibited from making both direct and in-kind contributions,<sup>3</sup> there are permissible uses of cooperative facilities and employee staff time related to campaign activities.<sup>4</sup>

Candidate Appearances at Cooperatives. Cooperatives can invite federal candidates to speak before the entire cooperative staff, directors, and member-owners. Only the candidate or candidate's representatives can ask for campaign contributions before a combined audience of restricted and non-restricted class individuals. No one may collect contributions at that time, but the candidate may leave brochures and envelopes for attendees to mail in contributions at a later time. If a cooperative invites a federal candidate to appear before a combined audience, all candidates for that seat must be given a similar opportunity upon request.<sup>5</sup>

Cooperatives have more flexibility when inviting federal candidates to appear before a restricted class audience.

The cooperative can endorse the candidate and encourage attendees to contribute to the candidate. Only the candidate may collect contributions at that time. Cooperative staff is prohibited from collecting contributions or facilitating contributions (e.g., by providing stamps or envelopes<sup>6</sup>). If the candidate appears only before a restricted class audience, the cooperative is not required to give other candidates a similar opportunity. However, if the cooperative allows the media to cover the event, the cooperative must allow all media representatives at the event and at any subsequent events with other candidates for the same office. Non-restricted class employees may be present if necessary to administer the meeting.<sup>7</sup>

Campaign Events at Cooperatives. Cooperatives can offer candidates the use of cooperative meeting space for campaign use at no cost if the cooperative customarily makes the same space available to other nonpolitical outside groups and will make the space available, on the same terms, to any candidate or political committee upon request.<sup>8</sup> Otherwise, the campaign must rent the space from the cooperative at the commercial rate.<sup>9</sup> Food and refreshments must be paid for by the campaign to prevent illegal in-kind contributions by the cooperative.

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**Cooperative Staff Time.** Cooperatives may allow employees to participate in a campaign during regular work hours, but the employee must make up the hours within a reasonable time.<sup>10</sup> Staff may also use earned vacation time to campaign.<sup>11</sup> A cooperative may not continue providing fringe benefits while an employee is on leave without pay to participate in a campaign.<sup>12</sup>

Employees volunteering for campaigns may do so at the cooperative provided that the amount of time

spent doing volunteer work does not exceed one hour per week or four hours per month and the work does not interfere with the operation of the cooperative.<sup>13</sup> Use of corporate facilities by the employee for volunteer work is permissible unless it raises overhead or operating expenses.<sup>14</sup> The employee must reimburse the cooperative for any additional expenses incurred such as long distance phone charges.<sup>15</sup>

### Political Communications

**Communications to the Restricted Class.** Cooperatives may finance or use cooperative resources to make communications that encourage the restricted class to vote for or against federal candidates. The communications must not reprint or reproduce campaign materials, although brief quotations from a candidate may be used. A large number of such communications or expensive formats may trigger a reporting obligation.<sup>16</sup> These communications can be distributed to the general public, but only under the rules discussed below.

**Communications to the General Public.** In *Citizens United v. Federal Election Commission* (*Citizens United*), the U.S. Supreme Court (Court) established a First Amendment right for a corporation to use an unlimited amount of general treasury funds for "independent expenditures" and "electioneering communications."<sup>17</sup> Although new regulations have yet to be adopted, the Federal Election Commission (FEC) is no longer enforcing the existing regulations that prohibit this type of corporate spending.<sup>18</sup> It is important to note that the Court's decision did not change the law prohibiting corporations from making contributions to federal campaigns. "Independent expenditures" are public communications that expressly

advocate the election or defeat of candidates for office, but are not made in cooperation, consultation, or concert with, or at the request or suggestion of any candidate, the candidate's campaign, or a political party.<sup>19</sup>

"Electioneering communications" are independent broadcast, cable, or satellite communications that: (1) clearly refer to a candidate for federal office, (2) are publicly distributed within 30 days of a primary election or 60 days of a general election, and (3) can be viewed by at least 50,000 individuals in the district where the election involving the featured candidate is being held.<sup>20</sup>

*Citizens United* allows cooperatives to use general treasury funds for independent expenditures or electioneering communications to the general public. For example, cooperatives can finance communications that encourage the public to "vote for," "support," or "vote against" a particular federal candidate. The cooperative must act independently of any candidate, campaign, or political party. If the cooperative coordinates these communications with a candidate, campaign, or political party, the expenditures would constitute an illegal corporate contribution to that campaign. If the cooperative coordinates the use of PAC funds for these communications, the amount spent would need to be reported as an in-kind contribution subject to the \$5,000 federal contribution limit.

The Court upheld disclaimer and reporting requirements for both types of communications.<sup>21</sup> Disclaimers (printed in a box) must include the full name and address, phone number or internet address of the cooperative funding the message, and a statement affirming that the message is not authorized by any candidate or committee.<sup>22</sup>

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Reports must be filed with the FEC within specific timeframes depending upon the amount disbursed and the time between dissemination of the message and the day of the election.<sup>23</sup> Reports are due as quickly as 24 hours after the communication has been disseminated to the public.

At the time of the Court's decision, approximately half of states were already allowing this type of corporate political spending, leaving the other half to amend the now unconstitutional laws. Cooperatives planning to make political communications in state elections should review state and local rules or consult state election officials.

### **Tax Considerations**

The Internal Revenue Code (Code) prohibits an organization exempt from taxation under Code section 501(c)(3) from participating or intervening in any political campaign supporting or opposing a candidate for public office. The Code, however, does not prohibit an organization exempt under Code section 501(c)(12) from participating or intervening in these activities. As permitted by local, state, and federal law, therefore, an exempt electric cooperative may participate or intervene in campaign activities.<sup>24</sup>

If, however, an exempt organization described in Code section 501(c) expends any amount directly, or through another organization, to influence or attempt to influence the selection, nomination, election, or appointment of any individual to a local, state, or federal public office (Campaign Activity), then a tax is imposed on the lesser of the organization's "net investment income" or its "aggregate amount" expended on the Campaign Activity. The expenditure must be "directly related to and support" the selection, nomination, election, or appointment.

Net investment income means the excess of interest, dividend, rent, royalty, and sale or exchange of asset income over the allowable deductions directly connected with producing the income, without taking into account items taken into account for the unrelated business income tax. Expenditures for "nonpartisan activities," like voter registration and "get-out-the-vote" campaigns that are not identified with a candidate or political party, are not expenditures for a Campaign Activity.<sup>25</sup>

If, therefore, an exempt electric cooperative expends its funds, as opposed to member, director, or manager funds, on local, state, or federal Campaign Activities, then a tax is imposed. Likewise, if an exempt electric cooperative contributes its funds, as opposed to member, director, or manager funds, to a local, state, or federal separate segregated fund, and if the fund uses the contribution for direct Campaign Activity expenditures, then a tax is imposed.

On the other hand, if an exempt organization described in Code section 501(c) collects political contributions or dues and transfers them to a separate segregated fund (*e.g.*, a PAC), then it has not expended an amount for a Campaign Activity. The organization however must: (1) satisfy the requirements of applicable state or federal campaign laws and regulations, (2) maintain adequate records demonstrating that the amount transferred consisted of political contributions or dues, and not investment income, and (3) not use the amount transferred to earn investment income.<sup>26</sup>

If, therefore, an exempt electric cooperative properly collects ACRE® contributions from its members, directors, or managers, and properly transfers them to ACRE, then it has not expended its funds for a Campaign Activity and no tax is imposed.

### **Events with Elected Officials**

Once elected, federal officials must abide by additional ethics rules. Rules in both the U.S. House of Representatives and Senate (collectively, Members of Congress) prohibit elected officials and staff from accepting gifts or meals from lobbyists or employees of entities that employ or retain lobbyists.<sup>27</sup>

Meals. If a cooperative does not employ or retain an outside lobbyist, the cooperative can buy a meal for an elected official or staff. The meal must be less than \$50 and the total amount of gifts and meals in a calendar year must be less than \$100.<sup>28</sup> Members of Congress may choose to turn down meal invitations due to their own gift policies, which may be stricter than ethics requirements.

Anyone giving a gift to or purchasing a meal for an elected official should never tie the meal or gift to any kind of future or past official action. Gifts or anything of value (including campaign contributions) given in connection to an official act can raise questions of bribery or an illegal gratuity.<sup>29</sup>

### Conferences and Receptions.

"Widely attended events" are an exception to the \$50 gift rule. Cooperatives can offer Members of Congress and their staff free attendance to cooperative sponsored events where: (1) attendance is related to their official duties, (2) attendance is open to a range of people interested in a given matter or people from throughout a particular industry, and (3) at least 25 expected attendees will be individuals other than Members or employees of Congress.<sup>30</sup> Trade association meetings (*e.g.*, NRECA's annual Legislative Conference) are examples of widely attended events. Cooperatives and state associations that host a reception at

*Continued on page 4*



this conference may invite Members of Congress to attend. Again, Members of Congress may choose to decline invitations if they have their own policies against attending such events or they may choose to attend and just not partake of the food and drink offered.

Ethics rules for members of the executive branch differ from rules imposed on Members of Congress. Cooperatives interacting with high ranking officials or employees of federal departments or agencies should refer to rules published by the U.S. Office of Government Ethics.<sup>31</sup>

### Conclusion

Although election law and ethics rules can be complex, many electric cooperatives navigate federal and state laws to engage eligible staff, directors, and member-owners in the political process. This editorial addresses the federal issues and questions most often raised by electric cooperatives, but it is not an exhaustive list of permissible activities. If your electric cooperative faces a topic not addressed in this editorial, or if you have other questions, please feel free to contact me at 703-907-5846 or [jessica.tiahrt@nreca.coop](mailto:jessica.tiahrt@nreca.coop).

<sup>1</sup> 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.1(a)(1).

<sup>2</sup> 11 C.F.R. § 104.13(a)(1).

<sup>3</sup> 2 U.S.C. § 441b(a).

<sup>4</sup> As mentioned in part 1, this editorial applies to electric cooperatives primarily. It is unclear to what extent election law considerations differ for a public power district, public utility district, or similar entity.

<sup>5</sup> 11 C.F.R. § 114.4(b).

<sup>6</sup> Jan W. Baran, *THE ELECTION LAW PRIMER FOR CORPORATIONS* 35 (5<sup>th</sup> ed. 2008).

<sup>7</sup> 11 C.F.R. § 114.3(c)(2)(i)-(iv).

<sup>8</sup> *Id.* § 114.13.

<sup>9</sup> *Supra* note 6 at 29.

<sup>10</sup> 11 C.F.R. § 100.54(a).

<sup>11</sup> *Id.* § 100.54(c).

<sup>12</sup> *Id.* § 114.12(c)(1).

<sup>13</sup> *Id.* § 114.9(a)(2)(i).

<sup>14</sup> *Id.* § 114.9(a)(2)(ii)(B).

<sup>15</sup> *Supra* note 6 at 28.

<sup>16</sup> 11 C.F.R. § 104.6(a).

<sup>17</sup> *Citizens United v. FEC*, No. 08-205, 130 S. Ct. 876 (U.S. 2010).

<sup>18</sup> *FEC Statement on the Supreme Court's Decision in Citizens United v. FEC* (Feb. 5, 2010), [www.fec.gov/press/press2010/20100205CitizensUnited.shtml](http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml).

<sup>19</sup> 2 U.S.C. § 431(17).

<sup>20</sup> 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29.

<sup>21</sup> 130 S.Ct. at 916.

<sup>22</sup> 2 U.S.C. § 441d; 11 C.F.R. § 110.11.

<sup>23</sup> See 2 U.S.C. § 434(c); 11 C.F.R. § 109.10 (reporting requirements for independent expenditures); and 2 U.S.C. § 434(f); 11 C.F.R. § 104.20 (reporting requirements for electioneering communications). Reporting forms and additional guidance are available under "Forms for Other Filers" at [www.fec.gov/info/forms.shtml](http://www.fec.gov/info/forms.shtml).

<sup>24</sup> 26 U.S.C. § 501(c)(3), (12) (LEXIS through Pub. L. No. 112-50) and Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* § 17.6 (10<sup>th</sup> ed. 2011) (Hopkins).

<sup>25</sup> 26 U.S.C. § 527(f)(1), (2); 26 C.F.R. § 1.527-6(a), (b), (LEXIS through Nov. 7, 2011 *Fed. Reg.*); and Hopkins, *supra* §§ 17.6, 23.4.

<sup>26</sup> 26 C.F.R. § 1.527-6(e).

<sup>27</sup> Rules of the House of Representatives, 41 (Jan. 5, 2011), [http://rules.house.gov/Media/file/PDF\\_112\\_1/legislativetext/112th%20Rules%20Pamphlet.pdf](http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf); Rules of the Senate, Gifts, <http://rules.senate.gov/public/index.cfm?p=RuleXXXV> (last visited Oct. 4, 2011).

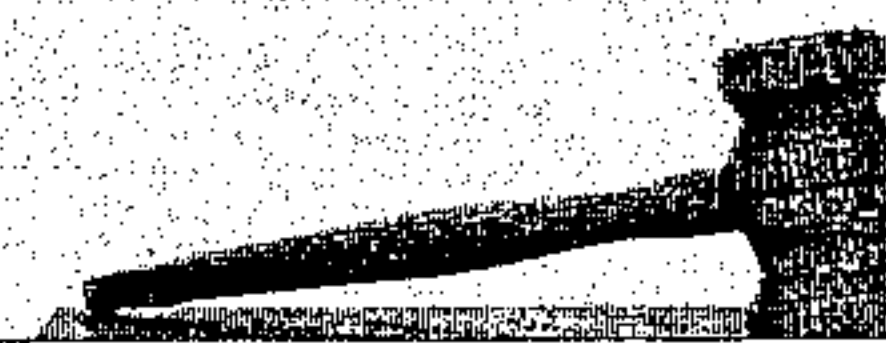
<sup>28</sup> *Id.*

<sup>29</sup> 18 U.S.C. § 201; House Ethics Manual, 79 (2008), [http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf).

<sup>30</sup> House Ethics Manual, 41 (2008), [http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf); An Overview of the Senate Code of Conduct and Related Laws, 4 (May 2011), [http://ethics.senate.gov/public/index.cfm/files/serve?File\\_id=1aec2c45-aadf-46e3-bb36-c472bcbcd20f](http://ethics.senate.gov/public/index.cfm/files/serve?File_id=1aec2c45-aadf-46e3-bb36-c472bcbcd20f).

<sup>31</sup> U.S. Office of Government Ethics, Gifts & Payments, <http://www.usoge.gov/Topics/Gifts-and-Payments/Gifts---Payments/> (last visited Oct. 4, 2011). Cooperatives should be aware that on September 13, 2011, a proposed rule was published that would impose limits on the use of gift exceptions when the gift is from a registered lobbyist or lobbying organization.

## Recent Decisions



### Demanding Higher Deposit Does Not Create Cause of Action

Federal court rules that utility's demand for additional assurance of payment from bankrupt debtor did not create cause of action – *Bankruptcy; Utility*

On September 20, 2011, in a chapter 13 proceeding, the U.S. Bankruptcy Court for the Southern District of Texas ruled that a utility's demand for additional assurance of payment under section 366 of the Bankruptcy Code (Section 366) did not create a cause of action for violating the automatic stay or Section 366, or for contempt of court. *In re Callihan*, No. 10-34896-H3-13, 2011 Bankr. LEXIS 3601, 2011 WL 4382615 (Bankr. S.D. Tex. Sept. 20, 2011).

Under Section 366, a utility may not discontinue service to a debtor because the debtor commenced a bankruptcy case or owed the utility a debt, unless the debtor fails to provide the utility "adequate assurance of payment" for future service within 20 days. Under Section 366(b), and upon a party's re-

quest, a court may reasonably modify the adequate assurance amount.

On June 11, 2010, Mary L. Callihan (Debtor) filed a voluntary petition under Chapter 13 of the Bankruptcy Code. On June 14, 2010, Debtor sent a letter to Entergy Texas, Inc. (Utility) notifying Utility that she had filed bankruptcy, and including a \$50 money order as "adequate assurance of performance." On June 25, 2010, Utility sent Debtor a letter stating that a larger deposit was due. Utility also applied Debtor's prepetition deposits against her prepetition debt.

On July 1, 2010, Debtor sent Utility a larger deposit, but less than Utility requested. Utility notified Debtor that service would be disconnected unless Debtor paid the requested deposits. After Utility sent a technician to dis-