

“How to Set Up and Maintain an Action Fund Affiliated with a Charity,” Rosemary E. Fei and Gregory L. Colvin, *Taxation of Exempts*, Volume 15/Issue 4, January/February 2004, Copyright © 2004 the Thomson Legal & Regulatory Group, or copyright owner as specified in the Journal.

WG&L Journals

POLITICAL AND LOBBYING ACTIVITIES

How to Set Up and Maintain an Action Fund Affiliated with a Charity

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As charitable tax-exempt organizations work to deliver better results to their constituents, an increasing number of them look for appropriate ways to become active in the political life of their city or county, state, or nation. This is true not only for groups interested in controversial issues such as the environment, gun control, animal welfare, civil rights, and world peace, but also for traditional religious, health care, and educational institutions. Charities are getting involved in efforts to influence legislative and executive branch decisions, judicial appointments, voter registration and turnout, and litigation in the courts. Section 501(c)(3) does not restrict the amount of administrative lobbying, nonpartisan voter activation, or litigation a charity may conduct in furtherance of its exempt purposes, but some types of advocacy are restricted or prohibited.

Some groups want to do more legislative lobbying than the “insubstantial” degree permitted under Section 501(c)(3) of the Internal Revenue Code. Most public charities can make the election under Section 501(h) to report lobbying expenditures up to the statutory limit, which can be as high as 20% of annual expenditures for small nonprofit groups. Still, the organization may want to raise and spend a greater amount to lobby Congress, to pay for mass media and other forms of grass roots lobbying, or to campaign for or against an initiative or referendum coming before the voters on election day.

Despite the Section 501(c)(3) absolute prohibition on intervention in campaigns of candidates for political office, some charities wish they could endorse or speak freely about candidates, rate candidates on their issues, or gain influence with public officials by helping them get elected as other interest groups do.

For charities wanting a more activist role in public policy, the best alternative may be to create a separate, affiliated entity under Section 501(c)(4), the tax status conferred upon social welfare organizations. The Internal Revenue Service has ruled that lobbying on legislation for the public good is a perfectly appropriate social welfare activity for a 501(c)(4) entity.¹ Regarding political intervention in candidate campaigns, the Service has ruled that this does not qualify as a social welfare activity, but it is a permitted function for a 501(c)(4) organization so long as true social welfare activities remain primary. Political intervention, then, along with other non-social welfare activities, must be “less-than-primary” for the entity to retain its 501(c)(4) exemption.² It appears, therefore, that rating, endorsing, supporting, and opposing candidates--while they remain off limits for charities--are legitimate secondary activities for an affiliated social welfare organization under federal tax law.³

Essentially, setting up a Section 501(c)(4) organization involves a tradeoff -- donations do not qualify as deductible charitable contributions to the donor, but the organization has no limit on the amount it may spend on lobbying and it can spend somewhat less than half of its budget, most practitioners believe, on partisan political activity. In this discussion, we will refer to the 501(c)(3) organization as “the Charity” and the 501(c)(4) affiliate as “the Action Fund.”⁴

There are three basic principles to be followed in structuring the relationship between the Charity and the Action Fund, especially where the Charity has been established and has developed considerable goodwill for some time prior to the creation of the Action Fund. These are guiding principles (and in some cases aspirational ideals), not absolutes. The specific arrangements must, of course, be tailored to the realities of the situation as well as legal requirements. The three principles are:

¹ Rev. Rul. 71-530, 1971-CB 237.

² Rev. Rul 81-95, 1981-1 CB 332.

³ Non-tax laws may curtail or shape a social welfare organization’s political affairs. Incorporated 501(c)(4) entities generally fall under the prohibition on corporate political spending to influence federal elections under the Federal Election Campaign Act (FECA), with additional restrictions in the most recent amendments of FECA contained in the Bipartisan Campaign Reform Act of 2002 (BCRA). Similar laws regulate 501(c)(4) electoral activities at the state level.

⁴ This article updates and extends a previous article by the same authors in this publication, Fei and Colvin, “How to Set Up a Lobbying Affiliate for an Existing Charity,” 6 JTEO 178 (Jan/Feb 1995). It should be noted that many of the same principles discussed here are relevant to relationships between a charity and any non-501(c)(3) exempt entity, such as a 501(c)(6) trade association affiliated with one or more charities, set up to pursue lobbying and/or political goals.

1. Maximum feasible separation of the Charity and the Action Fund, both legally and operationally.
2. No subsidy of the Action Fund operations by the Charity, except for specific charitable projects, which may include lobbying within the Charity's limits.
3. Avoidance of day-to-day control of the Action Fund by the Charity (or vice versa) as an "alter ego," although one entity may, in effect, retain ultimate control over the other's strategic decisions through an interlocking corporate structure.

These three principles are discussed in turn in this article.

Separation of Entities

The Action Fund must be a separate legal identity from the Charity. This is most clearly established through separate incorporation and separate operations. All corporate formalities should be carefully observed by each organization -- separate meetings of staff, board, and committees, as well as separate minutes of those meetings.⁵

Is an overlap between the boards of directors of a Section 501(c)(3) and a Section 501(c)(4) organization permitted under federal tax law? In short, the answer is absolutely yes.

In this regard, the primary concern running throughout federal tax law is not governance structure, but proper use of tax-deductible funds. The tax treatment of a Charity/Action Fund nonprofit combination is a unique product of two strong public policies -- one favoring expression of First Amendment political rights, and the other permitting Congress to place limits on the use of government subsidies.

Tax Subsidy Theory. Charities exempt from tax under Section 501(c)(3) enjoy the benefit of receiving gifts that donors may treat as deductible charitable contributions for income, estate, and gift tax purposes. This is an indirect government subsidy, in the form of lost tax revenue. Since Congress confers this tax benefit as a matter

⁵ While this article refers to the corporate form of entity, it is conceivable that many if not all of the structural goals discussed herein could be achieved through an unincorporated association, trust, limited liability company, or other non-corporate legal forms. Since the corporate form is disfavored under FECA, some organizations interested in influencing federal elections are exploring alternative formations, especially as various states adopt modern statutes based on the Model Nonprofit Unincorporated Associations Act, which includes limited liability protections for members.

of legislative grace, it may impose restrictions on use of deductible funds. Congress has prohibited Section 501(c)(3) organizations from engaging in substantial lobbying, and from any participation in political candidate campaigns, in order to prevent deductible funds from being used to support those activities.

However, nonprofit organizations, just like individual citizens, have certain First Amendment rights to engage in the political and legislative process, and so federal tax law must allow organizations an alternative means to express those rights without relying upon deductible funds. That vehicle is the Section 501(c)(4) affiliate, which cannot receive tax-deductible donations but which does (like the Section 501(c)(3) entity) enjoy exemption from tax on any annual excess of revenues over expenses, and can express the Charity's views on legislation without limits.

The U.S. Supreme Court, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983), upheld the Congressional limitation on Section 501(c)(3) lobbying for exactly these reasons: the Charity's First Amendment rights are preserved through its ability to speak through its affiliated Action Fund. The ease of establishing a Section 501(c)(4) affiliate was a key factor in the decision. The Court addressed the requirements the IRS may properly impose on organizations with a dual Charity/Action Fund structure. In footnote 6, the Court stated: "The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome."

More recently, a federal circuit court has applied the *Regan v. TWR* analysis to a situation involving political candidate intervention. In *Branch Ministries v. Rossotti* (DC Dir 2000) 211 F.3d 137, the court upheld the constitutionality of the Section 501(c)(3) prohibition on electioneering because, among other reasons, the charity (a church) could have formed a "related" organization under Section 501(c)(4), which in turn could form a political action committee that "would be free to participate in political campaigns."⁶

Although the Supreme Court and the IRS have not expressly so ruled in the case of Charity/Action Fund combinations, it is widely accepted by practitioners in the tax-exempt field (and, we believe, by the IRS officials who currently administer the area) that the Charity must be able to have a degree of control over the Action Fund sufficient to insure that the Action Fund does not pursue a public policy agenda incompatible with that of the

⁶ The court stated, erroneously, that a Section 501(c)(4) organization is itself subject to the ban on intervening in political campaigns, apparently unaware of the interpretation in Rev. Rul. 81-95 allowing political intervention as a secondary, non-social welfare activity.

Charity that created it. Otherwise, the Charity would lose the political voice that it is constitutionally entitled to exercise.

Overlapping Boards of Directors. An overlap between the two boards of directors appears to be a control arrangement that is satisfactory to the IRS. The IRS routinely accepts Section 501(c)(4) exemption applications submitted simultaneously with Section 501(c)(3) applications, showing a complete or partial overlap between the two boards, and both organizations are recognized as tax-exempt.

Milton Cerny, of Caplin & Drysdale, Washington, D.C., formerly chief of the Rulings Branch in the Exempt Organizations office of the IRS, has written that the boards of a Charity and an Action Fund can overlap, “in part or in whole.” He states that, “[w]hile the §501(c)(3) cannot play any role in the day-to-day conduct of the §501(c)(4)’s activities, it is not barred from exercising the ultimate policy control inherent in its ability to select the board of directors of the §501(c)(4) and to determine their tenure.”⁷

It is a basic principle of federal tax law that any corporation, for-profit or nonprofit, may create a subsidiary corporation that will be regarded as a separate entity for tax purposes. Applying that principle, a Section 501(c)(3) charity may act as the parent of a non-charitable Section 501(c) subsidiary or even a taxable subsidiary, without jeopardizing the parent’s tax status.

General Counsel Memorandum 33912 (August 15, 1968), addressed this question in the case of a Section 501(c)(3) organization which held a controlling interest in a commercial newspaper operation that engaged in legislative and political activity. The GCM concluded that the activities of a subsidiary should be attributed to the parent “only where the evidence clearly shows that the subsidiary is merely a guise enabling the parent to carry out its legislative activities or where it can be proven that the subsidiary is an arm, agent, or integral part of the parent.”

If the subsidiary has been formed for a *bona fide* purpose and is not a mere instrumentality of the parent organization, and if the parent does not actively participate in the day-to-day management of the subsidiary, then the controversial activities of the subsidiary -- whether they are commercial, legislative, political, or even illegal -- will *not* be attributed to the parent.⁸

⁷ Cerny, “Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions,” New York University’s Nineteenth Conference on Tax Planning for 501(c)(3) Organizations (Matthew Bender, 1991) at 5-39.

⁸ See also GCM 36203 and GCM 39326.

Even though tax law allows the Charity to completely control the selection of the Action Fund's board of directors, it is best to establish only that degree of control necessary to ensure political compatibility and no more. This is important for several reasons:⁹

First, if the IRS were to examine all the facts and circumstances to determine whether an Action Fund was a "mere instrumentality," a "guise," or an "arm," of a Charity, the extent of the Charity's involvement in the affairs of the Action Fund's board of directors is likely to be a relevant factor.

Second, if an Action Fund, wholly controlled by a Charity, has little significant activity of its own but serves as a platform to create a political action committee, which the Charity may not do, there is a risk that the IRS may argue that the Charity has used an artifice to avoid the prohibition on political candidate activities.

Third, since the two organizations will undoubtedly transact business with each other (grants, reimbursements, sharing tangible and intangible resources, etc.), some diversity in directors and officers allows each entity to establish a more arm's length, disinterested approval process for inter-organizational transactions.

Finally, if the Action Fund fails to maintain the legal and financial attributes of separate existence, so that the Action Fund's corporate form is disregarded, it is better to have any resulting liabilities land at the feet of the Action Fund directors, rather than at the doorstep of the Charity that selected them.

One common solution is a *de facto* overlap between the boards of the Charity and Action Fund corporations, but without corporate legal control, *i.e.* neither entity is given the legal power to select or remove any of the directors of the other. The members of the Action Fund's board of directors who also sit on the Charity's board must understand that, when acting in their capacity as Action Fund directors, they have a fiduciary duty under state corporate law to manage the affairs and assets of the Action Fund in accordance with the Action Fund's articles and bylaws. They are legally required to act in the best interests of the Action Fund, and their duty of loyalty to the Action Fund prohibits them from placing the interests of another organization, such as the Charity, above the interests of the Action Fund. Of course, the same is true in reverse when these overlapping directors act as members of the Charity's Board.

⁹ There are other rules that the two organizations may wish to avoid, such as nondiscrimination regulations affecting employee benefits and accounting rules requiring consolidated final statements, by creating a sufficient degree of separation between them.

It is important to reiterate that it is thoroughly defensible for the Charity to have complete power to appoint and remove all members of the affiliate Action Fund's board of directors, or vice versa. This is frequently accomplished by setting up the Action Fund as a membership corporation, with the Charity as the sole voting member, or by simply granting the Charity, in the Action Fund bylaws, the power to designate, remove, and replace the Action Fund directors at will. However, there are many other ways to exercise a more modest, yet effective, degree of control:

- The Charity could select the initial Action Fund board, leaving that board to elect its successors.
- Certain seats on the Action Fund board could be required to be filled by representatives of the Charity, or the Charity could have power to appoint a certain proportion of the Action Fund board.
- The Charity could approve a pool of persons in advance, from which the Action Fund board could select its directors, or selections made by the Action Fund board can be vetoed by the Charity until acceptable persons are found.
- The overlap could be *de facto* only, with an informal understanding that the overlap is to continue. This can work well in closely-held corporations where the directors understand the importance of maintaining continuity over the long term, and would only bring in new directors who agreed to serve on both boards.
- A non-corporate mechanism may be used to maintain political compatibility, such as a licensing or affiliation agreement under which the Action Fund agrees to use the name, logo, or other resources of the Charity (paying fair market value, as applicable), but subject to the Charity's power to terminate the agreement for cause, or even without cause.

Over the years, we have found that the following legal form of interlock is optimal for many 501(c)(3) - 501(c)(4) tandem arrangements: One entity, the Charity here, has no reference in its articles or bylaws to the other affiliated organization, the Action Fund in this example. The Action Fund's bylaws provide that the Charity has the power to appoint and remove, at will, all (or a majority, which is often sufficient) of the directors of the Action Fund, *however*, the Action Fund board must, at all times, have a majority who are not also directors, officers, employees, or agents of the Charity. The Action Fund's bylaws provide that no amendment can be made affecting the powers of the Charity without the Charity's written consent, preventing the Action Fund from unilaterally undoing the interlock. This structure ensures that the Action Fund will not be spirited away from the Charity by a board

with divergent views, but allows each board to muster a disinterested majority of directors to approve transactions between them.

In this discussion, we focus mainly on the dynamics of an existing charity setting up a new social welfare affiliate for public policy work. In today's activist environment, the Section 501(c)(4) entity is often created first, or at the same time as the Section 501(c)(3) charity.¹⁰ The better arrangement, in those circumstances, is usually to place the 501(c)(4) organization "on top," so that the non-charity (1) controls the selection of all or most of the charity's board and (2) develops (without the subsidy of tax-deductible funds) the name, logo, mailing list, and other intangible assets that the charity (and the political program) will derive from the parent 501(c)(4) entity.

Other Legal Steps to Take. The new organization should apply to IRS and state regulators as appropriate for recognition of its tax-exemption. Group exemption is possible if there will be multiple organizations in the same tax-exempt category, for instance, where separate 501(c)(4) entities are set up to function in particular states or localities.¹¹

Each organization must maintain its own full set of corporate records and its own Federal Employer Identification Number (FEIN). Each entity should have its own separate bank accounts, and funds should not be freely commingled or transferred without appropriate (and documented) reason. To the extent possible and as soon as practical, the Action Fund should establish its own accounts with vendors and be separately billed, for example, for printing and office supplies. The telephone number for the Action Fund should also be a separate line, separately invoiced.

Ideally, the Action Fund should have its own paid staff of employees, even on a part-time basis, rather than using the Charity's administrative staff. However, this degree of staff separation is often not feasible for small organizations. Later in this article we discuss acceptable ways of sharing staff and other resources.

If feasible, the mailing address of the Action Fund should be different from the Charity's, even if it is only a post office box which will be the only address shown on the

¹⁰ In some instances, no new Section 501(c)(3) is created. Rather, the Section 501(c)(4) organization obtains "fiscal sponsorship" for its charitable lobbying and non-lobbying programs from an existing, unrelated Section 501(c)(3) public charity. See Colvin, *Fiscal Sponsorship: 6 Ways to Do It Right*, San Francisco Study Center Press, 1993, pp. 27-41. This way, the (c)(4) can obtain access to tax-deductible funds raised to support discretionary grants from the fiscal sponsor to the (c)(4), keeping the entire charitable/lobbying/political program under one corporate entity.

¹¹ As an example, the National Association for the Advancement of Colored People, a national 501(c)(3) organization, has set up its affiliated NAACP chapters as 501(c)(4) entities.

Action Fund's letterhead. It is best for the Action Fund not to use the Charity's address as its address, especially on official documents, since the IRS has been known to use this fact to select Charity/Action Fund combinations for audit.

Joint Fundraising. Fundraising efforts by an affiliated Charity and Action Fund, to be completely safe from challenge, should be conducted separately in order to maintain a clear distinction between the two organizations in the minds of the donors. It is possible for a Charity and an Action Fund to engage in joint fundraising activities, but not without a certain degree of risk. Given the variety of forms that joint fundraising can take and the lack of legal precedent or guidance from the IRS in this area, great care should be taken.

Here are a few practical suggestions for Charity/Action Fund joint fundraising mailings, events, or other activities:

1. Before undertaking any joint activities, each entity should have had its own fundraising events and solicitations. This is especially important in the early stages of the Action Fund's existence. This way, the Action Fund can establish that its overhead, and the cost of subsequent solicitations, are paid for with its own, nondeductible funds. It is best to avoid the implication that the Charity has subsidized, fronted, or provided the occasion for the Action Fund to raise funds. Start-up legal costs and filing fees should be paid by the Action Fund, not the Charity, from nondeductible donations, or loans (which, if made by the Charity, must bear interest at the market rate).

2. If and when the Charity and Action Fund do conduct joint fundraising, it is better for the Action Fund to pay the up-front costs and incur the liabilities that may be needed to conduct the joint solicitation, with the Charity reimbursing its share later. This avoids giving the impression that the Charity has subsidized the event, mailing, or other communication.

3. When the expenses of joint fundraising are allocated, strict accounting standards should be followed, so that the Action Fund pays no less than its fair share of costs. Generally, the Action Fund should pay the fair market value of any Charity asset that it uses, including the Charity's mailing list. In some cases, an allocation of costs paid to outside vendors based on the proportion of revenues received by each organization will be the most reasonable approach.

4. Careful attention should be given to the handling of donations. It is best if donors make out separate checks to each entity. If that is not practical and checks will be made out to the one entity, which will then share the proceeds with the other, the entity receiving the checks should enter into an agency agreement with the other. The agreement

should spell out appropriate procedures, safeguards and obligations, especially regarding information provided to donors about their income tax deduction. The donor must be apprised of the amount or percentage of the gift that is for the Action Fund and therefore is not a tax-deductible charitable contribution.¹² Donors may be told that the amount or percentage of the funds to be given to the Charity is deductible, but extreme care must be taken in the documentation of this arrangement, because that disclosure is also potentially affected by the presence of return benefits to the donor (*e.g.*, dinner tickets), as governed by Internal Revenue Code Section 170(f)(8) and regulations thereunder. Each entity should report only its proper share of the joint revenues on its Form 990 tax return; the entity receiving the checks in the first instance should not treat the combined gross proceeds of the fundraising effort as its own revenue.

5. All written fundraising materials, as well as oral appeals for funds, must be scrupulously prepared so as to accurately present the distinct legal and tax status of the two entities.

Avoiding Subsidies

The Charity should not subsidize the Action Fund's general operations or any portion of the Action Fund's budget that is not charitable.¹³

The Charity may legally fund specific charitable projects conducted by the Action Fund, under Rev. Rul. 68-489, 1968-2 CB 210, so long as the Charity retains discretion and control over the funds. The Charity should enter into an appropriate grant agreement specifying how the funds will be used by the Action Fund, what obligations the Action Fund will have to report on the use of the funds to the Charity, and what remedies the Charity will have if the Action Fund misuses the granted funds. The Charity can even provide that all or a portion of the funds granted shall be used for direct or grass roots lobbying activity on issues of interest to the Charity, if it counts this amount as a lobbying expenditure, within the limits applicable to the Charity.¹⁴

¹² Internal Revenue Code Section 6113.

¹³ The reverse situation, where the Action Fund subsidizes the Charity, is completely permissible. In fact, it may be advantageous for the Action Fund, if it has a surplus of cash and the Charity has a deficit, to loan a certain amount to the Charity. The Charity can repay the loan with deductible funds.

¹⁴ Charities electing Section 501(h) must follow the "controlled grant" and transfer rules set forth in Reg. Sec. 56.4911-3(c) and 56.4911-4 when making payments to non-charities that lobby.

The Charity should not provide goods or services to the Action Fund without receiving payment representing at least full fair market value in return, or, in some cases, reimbursement of no less than a fair share of the Charity's costs for the goods or services.

If complete operational separation is not feasible, the Charity may provide certain equipment and/or services to the Action Fund, including office space, computers, furniture, shared staff, payroll and benefits, lobbying and government relations, media and public relations, internet services, and bookkeeping. In that situation, however, the following items should be covered in a written, arms-length resource sharing agreement:

1. All services provided by the Charity should be charged directly to the Action Fund at the higher of fair market value (comparable commercial rates) or actual cost (based on vendor invoices). If the Action Fund's payments to the Charity can be fairly characterized as a reimbursement of shared expenses, they would not appear as income on the Charity's Form 990 tax return. However, if the Action Fund is really just purchasing technical support services from the Charity, the Charity may have treat the payments as earned income, subject to unrelated business income tax if taxable under Section 512.

2. The Charity staff working on Action Fund matters should keep time records, which can then be used to determine the percentage of each Charity employee's time, during each pay period, devoted to the Action Fund work. That percentage of the employee's salary should be charged to the Action Fund, plus a factor covering employee benefits.

3. Using a reasonable allocation method (such as the employee time records mentioned above), a proportionate amount of the Charity's overhead, including rent, utilities, insurance, support staff, etc., should be charged to the Action Fund.

4. Where use of resources can be metered (e.g., phone calls, photocopying, postage, fax), records should be made and charges should be separately billed to the Action Fund.

5. To avoid the implication that Charity has advanced funds or credit on the Action Fund's behalf, the Charity might consider requiring a deposit in advance from the Action Fund for the estimated value of shared resources to be used during a set period of time, which could be a month, quarter, or year. This can be treated as an "imprest" fund, so that as reimbursement charges are made against the deposit, the Action Fund replenishes the deposit before the next period begins.

If office space is shared, the Charity and the Action Fund should enter into a clearly documented, commercially-reasonable lease or sublease. The rental may be below market only if it is the Action Fund leasing or subleasing to the Charity.

If the Charity wishes to extend coverage under its directors and officers liability insurance policy to the Action Fund, it may do so, provided the Action Fund pays for such coverage. Even if the insurer adds the Action Fund's directors and officers to the Charity's policy at no additional cost, the Action Fund should pay the Charity for a portion of the premiums, allocated on some reasonable basis such as the relative size of the two organizations' annual budgets.

Alter Ego Problems

Neither entity should direct or control the day-to-day activities of the other.

To maintain the integrity of the separate incorporation of the Action Fund and minimize the Charity's liability exposure, the Charity should not become involved in the day-to-day management of the Action Fund's affairs. The Charity's board and officers should never direct the Action Fund's board or staff to take any action, or vice versa. Lines of authority, accountability, and responsibility should be separate, clearly understood, and well-documented.

The Charity and the Action Fund may communicate and coordinate at a strategic level, so long as it is clear that each is pursuing its own agenda and furthering its own corporate purposes in the course of such cooperation. In our experience, one of the biggest "alter ego" problems for 501(c)(3)-501(c)(4) tandem organizations, especially for small organizations managed by the same leadership team, is the tendency to make decisions affecting the Charity or the Action Fund or both "on fly" and to communicate those decisions orally or by email, without making a written record to be placed in the files of the proper entity. The best practice, to borrow a cliché from Hollywood, is to stop and "take a meeting" of the board, executive committee, or staff of the appropriate entity, and put the meeting minutes or at least a memorandum in the Charity or Action Fund records. In the event of a transaction between the two entities, such as a grant, joint program, or new shared expense, each organization should have a record that it assented to the transaction, which sometimes involves an exchange of correspondence between the two. It always helps to designate at least one person who will act as the guardian of the smaller entity's affairs, who will forcefully insist that his or her entity's agreement must be documented rather than assumed, and that joint plans should not proceed without his or her written approval.

Resource sharing agreements between the Action Fund and the Charity should clearly state that they are *not* management contracts. The Action Fund board is not

delegating management of its affairs to the Charity. Rather, the Action Fund board is contracting with the Charity for the time of certain staff members, who carry out assigned administrative tasks under the direction and control of the Action Fund board.

The same person may, and frequently does, serve as executive director of both the Charity and the Action Fund. However, to prevent this fact from being used as evidence that the Charity controls the day-to-day activities of the Action Fund, it must be clear that the executive director is responsible directly to the Action Fund board for the performance of his or her Action Fund duties, not to the Charity board, and vice versa.

The Charity and the Action Fund should clarify, where appropriate, for the news media and others, that the Charity and the Action Fund are separate organizations. This may require that the Charity monitor how the media describe the two, and send letters to news editors as needed to make the distinction clear. Also, staff and volunteers of both organizations should be educated about the distinction. A handout should be prepared clarifying the distinction between the two organizations and emphasizing that no one is acting as an agent of the Charity while working for the Action Fund. Ideally, a copy should be signed by each employee and volunteer of either organization who works on affairs of the other or who deals with the public, and kept on file by each organization.

Conclusion

Once a charity has made the decision to set up a separate Section 501(c)(4) organization in order to maximize its political power and influence, the legal challenges start and never end. In addition to the tax and corporate law issues presented here, the affiliated social welfare organization will have its own federal tax compliance issues, such as demonstrating, every year, that its nonpartisan public benefit activities predominate over its partisan political work, and coping with the special lobbying and political tax rules under Sections 162(e) and 527(f), which do not apply to charities. Whether it does or does not set up political committees to raise and spend money to influence ballot measure and candidate elections, it will have to contend with a host of intricate federal, state, and even local campaign finance and ethics rules laden with disclosures, prohibitions, and frequent filings. In the new arena of internet-based organizing and advocacy, planning for the construction, linkage, and cost allocations of interactive web pages and email messaging can involve legal issues of intellectual property, privacy, and defamation, as well as straining the application of tax-exempt and nonprofit corporate laws that have not kept pace with technological advances. Political speech may be free in theory, but the risks and costs of legal compliance continue to rise. It must be worth the price, however, because more and more tax-exempt organizations seem compelled to find their full-throated political voices.