

**Statement by INDEPENDENT SECTOR on Disclosure
of Political Activities of Tax-Exempt Organizations
For a Hearing of the Oversight Subcommittee
of the House Ways and Means Committee**

June 20, 2000

INDEPENDENT SECTOR (IS) is a coalition of more than 700 national organizations and companies representing the vast diversity of the nonprofit sector and the field of philanthropy. Its members include many of the nation's most prominent nonprofit organizations, leading foundations, and Fortune 500 corporations with strong commitments to community involvement. The network represents millions of volunteers, donors, and people served in communities around the world. INDEPENDENT SECTOR members work globally and locally in human services, education, religion, the arts, research, youth development, health care, advocacy, democracy, and many other areas. No other organization represents such a broad range of charitable organizations and activities.

INDEPENDENT SECTOR's mission is to serve as a national leadership forum, working to encourage philanthropy, volunteering, not-for-profit initiative and citizen action that serve people and communities. All of our efforts are aimed toward a vision of an American society that promotes the general welfare of all its citizens and encourages active citizen participation, preserves basic freedoms and fosters collaboration and partnerships among government, business, the independent sector and communities. Our vision also prizes an independent sector that is recognized for its effectiveness, responsiveness, openness and accountability.

The Subcommittee has announced that it is studying various proposals for enhanced disclosure relating to political activities of tax-exempt organizations, including section 501(c)(4), (5) and (6) organizations and section 527 organizations. The substantial majority of INDEPENDENT SECTOR's members are section 501(c)(3) organizations, and as such, they are prohibited from intervening in political campaigns for public office. Accordingly, the proposals under consideration by the Subcommittee should not directly affect charitable organizations. Nevertheless, INDEPENDENT SECTOR has an interest in the Subcommittee's work for several reasons. First, INDEPENDENT SECTOR takes a strong interest in the rights of individuals to gather in nonprofit organizations to pursue their common interests, including advocacy on matters of public concern. Second, given our mission and vision for American society, INDEPENDENT SECTOR is deeply concerned about the steady decline in public participation and confidence in the democratic process and supports constructive initiatives to increase public confidence and participation. Third, as noted above, INDEPENDENT SECTOR has a core commitment to strengthening the integrity and accountability of the tax-exempt sector. Finally, our membership does include a number of section 501(c)(4) organizations, some of which have affiliated section 527 organizations. With these interests in mind, IS offers views that it would like the Subcommittee to consider as it considers the complex questions of public disclosure raised by section 527 organizations.

Concerns about Free Speech, Free Association, and Privacy

The current debate surrounding section 527 organizations is challenging precisely because it requires Congress to strike a balance between two fundamental concerns related to the health of our democracy: the constitutional rights of free speech, association, and privacy on the one hand, and the importance of maintaining public confidence in the integrity of our electoral process on the other. Striking the appropriate balance requires great care. Therefore, INDEPENDENT SECTOR commends the Subcommittee

for taking the time to hold a hearing and encourages all members of Congress to use the highest degree of care when evaluating any legislation that may be forthcoming.

The constitutional rights of speech, association, and privacy are fundamental to maintaining the health of our democracy not only in the electoral process but also in all aspects of the formation of public policy. The Supreme Court has repeatedly recognized that Congress can pass laws burdening the exercise of these rights in connection with advocacy activities only where the government has a compelling interest and then only where the restrictions are clearly and narrowly framed to provide the least burdensome means of safeguarding that compelling government interest.

As a practical matter, Americans exercise their rights of free speech and association to affect the formation of public policy largely through their membership in and financial support for a broad range of nonprofit organizations. The Supreme Court has specifically ruled in *NAACP v. Alabama* that forcing a nonprofit organization to disclose the identity of its members and the amount each has provided in financial support violates First Amendment rights to free speech and association absent a compelling governmental interest that is reasonably and clearly served by that disclosure.

The scope of these First Amendment protections is not in the least diminished by the fact that the nonprofit organizations through which they are exercised are, themselves, exempt from tax. The seminal Supreme Court decision articulating this “anonymous speech doctrine” involved a tax-exempt nonprofit—the NAACP. Moreover, even in *Taxation with Representation*, the Court’s holding that the Internal Revenue Code restrictions on lobbying by charities are constitutional was premised on the fact that charities can engage in unlimited lobbying through closely affiliated alter egos exempt from tax under section 501(c)(4). INDEPENDENT SECTOR believes that rights to free speech and association would be seriously compromised if public disclosure of donors were made a condition for all tax-exempt organizations that engage in advocacy with respect to public policy or politics.

The Public Interest in Maintaining The Integrity of Our Democratic Electoral Process

The other fundamental interest implicated by disclosure of information on electoral activities by tax-exempt organizations is the integrity of our democratic electoral process. IS recognizes that the health of our democracy depends not only on freedom of speech and association, as we have articulated above, but equally on public confidence in the integrity of our electoral process.

In *Buckley v. Valeo*, the Supreme Court upheld Congress’ judgment that the public interest in avoiding corruption or the appearance of corruption in politics is sufficiently strong to justify imposing reporting obligations and contribution limits on a narrow class of political speech—so-called “express advocacy” as defined by the Court. Since *Buckley*, the courts have, however, repeatedly struck down efforts to impose the Federal Election Commission Act (FECA) contribution limits and reporting regime on a broader class of campaign-related speech.

IS recognizes that the public disclosure of donors to candidates for federal office and to section 527 PACs that engage in express advocacy has served a compelling public interest in shedding light on the electoral process.

The section 527 organizations currently of concern to Congress are those that seek to influence elections without engaging in express advocacy, and, therefore, operate beyond the reach of FECA and its mandated disclosure. Any effort to regulate contributions to or expenditures by these non-PAC section 527 organizations thus clearly raises the constitutional concerns highlighted by the courts in *Buckley* and subsequent decisions. That is not to say, however, that all efforts to regulate 527 organizations or other entities engaged in political speech outside the definition of express advocacy are necessarily unconstitutional.

Extending the Current System of Disclosure for Tax-Exempt Organizations To Section 527 Organizations

INDEPENDENT SECTOR strongly shares the concern that the current ability of section 527 organizations to avoid registration and reporting under both FECA and the Internal Revenue Code simply by refraining from express advocacy seriously threatens public confidence in the electoral process and in tax-exempt organizations. According to published reports, over the last several years the flow of funds to section 527 organizations for clearly electoral purposes has increased dramatically. It is understandable why the Subcommittee is interested in exploring what is happening with these organizations, consistent with an overall interest in providing accountability for tax-exempt entities.

Noting that all other classes of tax-exempt entities (other than churches) are required to file an annual Form 990 information return, IS reiterates its support for extending this reporting regime to section 527 organizations.¹ Under this reporting regime, section 527 organizations would be required to file with the IRS annual information returns reporting the identity of officers, directors, and substantial donors, as well as revenues and expenses.

Further, INDEPENDENT SECTOR would support making these annual returns available to the public under the same ground rules that currently apply to the disclosure of Forms 990 filed by all other categories of exempt entities.²

Some persons might respond to these new reporting requirements by attempting to recreate the current benefits of section 527 by using non-exempt entities to accept contributions and make expenditures for clearly partisan electoral communications. Anticipating this possibility, IS would also support the enactment of an appropriate backstop provision dealing with non-exempt entities operated for the primary purpose of influencing elections.

While requiring section 527 organizations to file annual Forms 990 would be an important step forward, these information returns would typically be filed long after an election campaign closes and thus would obviously not meet the public interest in timely information about the establishment and operations of these entities. Accordingly, INDEPENDENT SECTOR would support going beyond the standard Form 990 reporting regime in three respects: first, requiring section 527 organizations to file registration statements with the IRS immediately upon their creation, second requiring section 527 organizations whose income and/or expenditures exceed specified thresholds to file quarterly financial reports, and third, establishing a means for expedited public disclosure of these reports. To provide this expedited disclosure, Congress should consider requiring simultaneous filing of these documents with the Federal Election Commission.

While supporting the extension of Form 990 filing requirements to section 527 organizations, we note with concern that this would impose a significant new responsibility on the IRS' chronically under-funded exempt organizations function. If Congress imposes this new responsibility on the IRS, it is vital that Congress provide the IRS with the necessary funding as well.

Constitutional Considerations Relevant to Public Disclosure Of Donors to Section 527 Organizations

Whether Congress can and should go further and require public disclosure of section 527 donors (or of donors to other categories of exempt or non-exempt entities that engage in similar election-related speech) raises a series of fundamental constitutional and policy issues.

¹ See INDEPENDENT SECTOR comments on Joint Committee on Taxation Study on Disclosure by Tax-Exempt Organizations, p. 11.

² We discuss below the separate question of whether, in the case of section 527 organizations, Congress should go beyond the standard Form 990 reporting regime and require public disclosure of donors (information not publicly disclosed with respect to other classes of exempt entities).

The policy arguments for donor disclosure are strongest and the constitutional concerns are least forbidding if donor disclosure is required only for section 527 organizations. In contrast to all other categories of exempt organizations, section 527 organizations exist for the primary purpose of influencing elections and thus have by far the strongest nexus with the electoral process. Moreover, because of their ability to operate entirely below the radar and their favorable treatment for gift tax purposes, section 527 organizations have rapidly become the vehicle of choice through which large sums of money are flowing from undisclosed interests to fund clearly partisan electoral communications. The potential of this situation to foster corruption or the appearance of corruption, and thus to undermine public confidence in the electoral process, is beyond doubt.

In this regard it is also important to note that the IRS rarely, if ever, imposes section 527 status on an organization that denies that its primary purpose is to influence elections. Section 527 is thus, in practice, essentially an opt-in tax classification. Because of this opt-in character, the challenge of defining the “influencing elections” standard that creates the boundary of section 527 may not, in practice, raise a significant constitutional concern.

The Importance of Distinguishing Between Section 527 Organizations And Section 501(c)(4) Organizations

There has been broad discussion of whether at least certain other types of tax-exempt organizations should be subject to some form of donor disclosure if they engage in activities intended to influence elections or appointments within the meaning of section 527. Because section 501(c)(3) charitable organizations are prohibited from engaging in any partisan electoral activity, they have generally, and in our view most appropriately, been excluded from these proposals. There has been considerably more debate about whether section 501(c)(4) organizations—which may engage in some electoral activity—should be subject to a donor disclosure regime. INDEPENDENT SECTOR strongly urges Congress, in considering this question, to focus clearly on the profound difference between section 501(c)(4) organizations and section 527 organizations.

While both section 527 organizations and section 501(c)(4) organizations are permitted to sponsor partisan electoral communications, their relationship with the electoral process is quite different. Section 527 organizations are required by statute to operate for the primary purpose and, in practice, operate for the sole purpose of influencing that process; it is difficult to imagine a stronger and more direct electoral nexus. By contrast, section 501(c)(4) organizations are explicitly barred from having a primarily electoral purpose.³ To the extent they are interested in matters of public policy—and many are not—they must focus on advancing an issue-based, as opposed to an electoral, agenda. They pursue this goal primarily through public education and legislative advocacy, and to the extent that they engage in electoral activity, it is in support of their issue agenda.

In other words, in sharp contrast to section 527 organizations, for section 501(c)(4) organizations, involvement in the electoral process must be secondary to a fundamentally non-electoral purpose. Moreover, this non-electoral purpose—allowing groups of concerned citizens to speak with one voice on a public issue of common concern—lies at the very core of the First Amendment protections of association, speech, and privacy.

The potential chilling effect of imposing donor disclosure on section 501(c)(4) organizations is both substantial and real. For example, a faculty member of an academic institution may fear stigma or worse if it becomes publicly known that she has made substantial contributions to a section 501(c)(4) organization opposing affirmative action. Likewise, members of certain religious groups may fear similar reprisal if it is publicly known that they have made substantial contributions to a section 501(c)(4) organization promoting gay rights.

³ For example, the IRS has denied section 501(c)(4) status to the Christian Coalition on the ground that the Coalition had a primary electoral purpose.

Thus, given section 501(c)(4) organizations' more limited connection to the electoral process and their central role in facilitating citizens' issue-focused political speech, the balancing of constitutional interests weighs decisively against imposing a general donor disclosure requirement on section 501(c)(4) organizations simply because they engage in some electoral activities.

This conclusion, in turn, raises the further question of whether section 501(c)(4) organizations should be subject to some narrower donor disclosure regime—for example, being required to fund electoral activities solely through earmarked contributions, with only these earmarked contributions subject to disclosure. We have grave constitutional and policy concerns about even such more limited disclosure.

First, and by far most important, returning to the examples noted above, the chilling effect on potential donors could be every bit as profound under this “more limited” disclosure regime.

Further, requiring an organization to raise earmarked funds could significantly constrain its ability to pursue its issue agenda through electoral activity—a significant burden on issue-focused political speech. Given the lead-time required for fund-raising, an organization would have to predict well in advance its expenditures for electoral activities. To the extent it under-estimated those needs, it would have great difficulty raising the additional earmarked funds at the last minute. To the extent it over-estimated those needs, it would be left with excess funds in the earmarked account that could not be used for non-electoral purposes.

Finally, forcing organizations to use earmarked contributions to fund activities that influence elections would also raise serious vagueness concerns unless Congress or the IRS significantly clarifies the definition of “influencing legislation.” The IRS takes the position that whether a particular activity is intended to influence elections or appointments depends on all the facts and circumstances of the particular case. As any lawyer who advises exempt organizations on these issues can attest, there are many circumstances in which the line between non-electoral education or lobbying activities and partisan electoral activity is highly uncertain. The inevitable result of this uncertainty, combined with different disclosure consequences depending upon how the activity is characterized, would result in the sort of chilling effect central to the Court's analysis in *Buckley*.

Difficulties With a Registration and Disclosure Regime Based On Electoral Communications As Opposed to Type of Entity

The foregoing discussion has focused on possible disclosure regimes based on section 527 and other existing tax law entity classifications. In this discussion, we have indicated INDEPENDENT SECTOR's support for extending to section 527 organizations an enhanced version of the Form 990 reporting regime that applies to all other categories of exempt organizations. Further, in relation to the issue of donor disclosure, we have urged Congress to recognize the fundamental difference between section 527 organizations, with their primary purpose of influencing elections, and section 501(c)(4) organizations, with their primary focus on issue advocacy.

With this discussion as background, our closing comments address the very different approach to the section 527 disclosure issues typified by H.R. 4621, introduced by Representative Michael Castle. Unlike the entity-based reporting regimes discussed above, H.R.4621 would define a class of partisan election-related communications and would then impose new disclosure requirements on any entity – regardless of tax law classification – that makes such communications.

We have two concerns related to this communications-based approach.

First, as presently defined, the class of communications that trigger the proposed reporting and disclosure obligations is far too broad. For example, in its present form, H.R. 4621 would even reach a section 501(c)(3) charitable organization like Mothers Against Drunk Driving if it spent more than \$10,000 to run

newspaper ads around the state urging parents to contact identified state legislators in support of under-age drinking legislation.

Second, and more fundamentally, we think this communications-based approach fails to take account of the critical importance of organizational context in determining whether an election-related communication should trigger donor disclosure and other election-related disclosure requirements. As discussed above, in comparison to section 527 organizations, section 501(c)(4) organizations have a much less direct nexus with the electoral process and a much more direct nexus with the ability to citizens to express their views on policy issues.

Treating these two types of organizations as equally deserving of regulation simply because they both make partisan electoral communications ignores these fundamental differences that go to the heart of the balancing analysis required by the First Amendment.

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These are difficult and important issues that require careful balancing of competing concerns related to the health of our democracy. IS is deeply concerned about the potential of section 527 organizations to undermine public confidence in the electoral process and in the fundamental importance of the integrity of our democratic institutions. In addition, we also believe in the fundamental importance of allowing unrestrained citizen participation in issue-focused political debate through nonprofit organizations. We urge Congress to give full weight to both of these “public goods” as it debates the difficult issues before it. We look forward to working with members of Congress to reach this appropriate balance.