Wiley Rein LLP

# ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | March 2018

## IRS Releases New Tax-Exempt Application for 501(c)(4) Organizations

**By Brandis L. Zehr and Kenneth Daines**

The IRS recently released a new Form 1024-A application for recognition of tax exemption under Section 501(c)(4) of the Internal Revenue Code, which is now to be used by (c)(4)s instead of the Form 1024 effective January 16, 2018. According to IRS Revenue Procedure 2018-10, 501(c)(4) organizations may now request an IRS determination letter of their tax-exempt status by submitting a completed Form 1024-A application, along with Form 8718, *User Fee for Exempt Organization Determination Letter Request*. Additionally, the penalty of perjury statement signature must now be signed and dated by the taxpayer, rather than the taxpayer's authorized representative. The new instructions to Form 1024-A have also been significantly revised.

The Form 1024-A was created to comport with the requirements of Section 506(f) of the Protecting Americans from Tax Hikes Act (the PATH Act), which Congress added to the Code on December 18, 2015. In its discussion of Section 506(f), the Joint Committee on

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## ANALYSIS: *Citizens United*, Part 2? Controversial Second Circuit Ruling Sets Up Potential Supreme Court Fight Over Donor Privacy

**By Caleb P. Burns and Eric Wang**

Last month, the U.S. Court of Appeals for the Second Circuit ruled against Citizens United and its sister entity, Citizens United Foundation, in the organizations' fight against the New York Attorney General's attempts to obtain their confidential donor lists. The ruling, along with an appeal still pending in the U.S. Court of Appeals for the Ninth Circuit involving the same issue in California (but a different plaintiff), could set the stage for another major U.S. Supreme Court case involving the well-known plaintiff.

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# FEC Opens Formal Rulemaking on Internet Disclaimers

**By Jan Witold Baran, Michael E. Toner, & Andrew G. Woodson**

In a special session yesterday, the Federal Election Commission (FEC or Commission) voted to open a rulemaking on the disclaimer requirements applicable to many video, audio, graphic, and text-based political advertisements disseminated through the Internet, cell phones, and other digital devices. This proceeding is the first Internet-focused rulemaking at the FEC in over a decade and will impact Internet advertising for candidates, political committees, interest groups, advertising vendors, and all digital advertising platforms. The new rules could dramatically affect the technological requirements for all digital election ads. Notably, this rulemaking comes just days after a **published report** (subscription required) indicating that some FEC commissioners are pushing to hold media entities accountable for ensuring that paid advertisements carry the proper disclaimers.

Comments on the Commission's proposals will be due 60 days after publication of the rulemaking notice in the Federal Register, which we anticipate will happen in the next one to two weeks. If so, comments would be due in mid-to-late May.

Following reports of foreign-sponsored ads during the 2016 election, the FEC has come under significant pressure – including from nearly 150,000 public commenters – to reconsider the agency's approach to regulating political speech on the Internet. After several months of behind-the-scenes negotiations between the commissioners, the FEC unanimously agreed on Wednesday to put out for public comment a 64-page **Notice of Proposed Rulemaking (NPRM)** responding to some of these concerns.

At its broadest level, the NPRM reflects the Commission's desire to work together in an area of law with the greatest potential for reaching bipartisan consensus: disclaimers for advertisements placed for a fee on a third party's website that contain express advocacy (*e.g.*, "vote for/against Joe Smith"). The NPRM posits two principal approaches to regulating such communications and invites comment on both.

Alternative A, which was touted by Vice Chair Ellen Weintraub on Wednesday, contains several important elements:

- It would apply the same disclaimer rules that govern television and radio communications to online video and audio communications. Given the length of certain oral disclaimers, however, such a requirement could prove prohibitively challenging for the short, "pre-roll" video ads that appear before a user watches particular content on YouTube, for example.
- Alternative A would also import the same disclaimer requirements that apply to printed communications (*e.g.*, newspaper ads) to text and images disseminated online. This would mean, for example, that a paid Facebook advertisement independently urging a candidate's re-election or defeat must state "Paid for by *XYZ trade association*, [insert street address, phone number, or web address], and not authorized by any candidate or candidate's committee" on the face of the digital ad.
- Alternative A would provide an "adaptive disclaimer" option for a limited number of small, non-video communications, but this would only apply where the

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> technology cannot accommodate inclusion of the full disclaimer. That is, the "adaptive disclaimer" option could not be used simply because the advertiser subjectively concludes that a disclaimer is a "burden." Where the full disclaimer is technologically infeasible, however, Alternative A would require the ad to state "Paid for by [name of sponsor]" on the face of the ad and it would require an "indicator" allowing the reader to find the full version of the disclaimer, such as in a pop-up window or on a click-through to a landing website.

Alternative B, by comparison, was endorsed by Chair Caroline Hunter, and it would treat the disclaimers on Internet ads as fundamentally different than disclaimers on advertisements in traditional media. For Internet communications where the full disclaimer would exceed ten percent of the time or space (measured in characters or pixels) of the entire ad, the sponsor would be allowed to use an abbreviated disclaimer identifying the person who paid for such communication – which can be satisfied by a commonly-recognized acronym – and an indicator directing viewers to the location where to find the full disclaimer (*e.g.*, pop-up window or click-through to a landing website). Where this abbreviated disclaimer would itself exceed the ten percent threshold, Alternative B would only require the advertisement include the indicator itself – not the "Paid for by [name of sponsor]" statement.

Finally, the NPRM proposes (on a consensus basis) to modify the Commission's definition of "public communication." This is an important regulatory term-of-art that identifies the types of communications that must include a disclaimer. It also is relevant to the FEC's coordination regulations. An earlier comment to the Commission suggested that the current regulation's 2006-era definition would, for example, regulate a paid ad viewed through the Facebook website but could be read to exempt the same paid ad when viewed on the Facebook application. The FEC's suggested language purports to close the "loophole" the commenter identified.

**The bottom line**: This NPRM is an opportunity for candidates, parties, and interest groups to maximize their substantive messaging capabilities by underscoring the need for technological flexibility when dealing with disclaimers on online communications. Likewise, digital advertising vendors and online advertising platforms and applications should provide their technological expertise to the Commission, because their services will be directly impacted.

Wiley Rein is available to draft comments in response to this proposed rulemaking, either individually or as part of a larger coalition of organizations. ■

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# D.C. Circuit Releases Its Long-Awaited TCPA Decision — Could Affect Political Robocalls

**By Scott D. Delacourt, Megan L. Brown, Thomas J. Navin, Bennett L. Ross, and John T. Lin**

After nearly eighteen months, the United States Court of Appeals for the District of Columbia Circuit released its opinion in *ACA International v. Federal Communications Commission*, a petition for review of the Federal Communication Commission's (FCC or Commission) *2015 Telephone Consumer Protection Act Order* (2015 TCPA Order or Order). Among other matters, that Order (1) clarified what constitutes an automatic telephone dialing system (ATDS), (2) imposed liability, with some exception, for calling a wireless number that has been reassigned from a consenting party to another person without the caller's knowledge, (3) clarified how a consenting party can revoke consent to receive autodialed calls, and (4) exempted from the prior express consent requirement calls to wireless numbers for time-sensitive healthcare purposes. Using the two-step Chevron framework, the Court, in a unanimous opinion by Judge Sri Srinivasan, reversed the Commission's explanation of what constitutes an ATDS and its clarification on calling reassigned numbers, but upheld the Commission's ruling on revoking consent and the consent exemption for exigent healthcare calls.

The Court first considered the Commission's ATDS definition. Under the TCPA, an ATDS is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C § 227(a)(1). The FCC interpreted the phrase "capacity" to include "potential functionalities" or "future possibility," rather than just "present ability." The Court found this interpretation to be expansive and therefore unreasonable, fearing that it could sweep in smartphones as ATDS. It reasoned that the TCPA cannot be read to include "the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country," and that the *Order* cannot be read to exclude smartphones without failing arbitrary and capricious review.[1]

The Court also considered the Commission's description of the functions of an ATDS, specifically the FCC's interpretation of "using a random or sequential number generator." The Court found that the *Order* offered two competing descriptions of what devices satisfy the definition: encompassing both devices that have the capability to generate random or sequential numbers to be dialed, and those that cannot. The Court held that this inconsistent interpretation fails to provide clarity and therefore fails the requirement of reasoned decision making.

The Court next considered the FCC's decision to impose liability for calling a wireless number that has been reassigned from a consenting party to another person without the caller's knowledge. The TCPA prohibits making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing equipment or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). In the *2015 TCPA Order,* the Commission interpreted "called party" to refer to the person actually reached, which, in the reassigned number context, the subscriber to a number after reassignment. The Commission did, however, include a safe harbor provision, exempting a caller's first call to a reassigned number from liability.

Although the Court agreed that the Commission could interpret "called party" to refer to the current, post-reassignment subscriber, it held that the one-call safe harbor was arbitrary and capricious. The Court found that the Commission adopted this safe harbor because it interpreted "prior express consent" to mean "reasonable reliance," but that the FCC acted arbitrarily by providing no justification for why reasonable reliance is limited

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## The FEC Exempts Books Under Press Exemption

Two weeks ago, the FEC released the case file in MUR 6989. The case involved Penguin Random House's publication of *A More Perfect Union* by Dr. Ben Carson and its marketing of the book in the summer of 2015. A complaint was filed alleging that Penguin's expenses on Dr. Carson's promotional book tour constituted an illegal corporate contribution to Carson's presidential campaign. The FEC, by a vote of four to one, concluded that Penguin and the book are exempt from regulation under the campaign finance law's longstanding Press Exemption. Wiley Rein partner Lee Goodman discussed **this legal development in an opinion column published by *The Hill*.**

## New FEC Address

**By Karen E. Trainer**

The FEC is moving to a new office this month. Effective March 19, paper reports (except for Senate reports, as noted below) and other submissions to the FEC should be sent to or filed in person at:

**Federal Election Commission**
**1050 First Street NE**
**Washington, DC 20463**

Senate campaign committees and other committees that support only Senate candidates should continue to submit reports to the Secretary of the Senate.

We strongly recommend retaining delivery confirmation or date-stamped copies of paper reports and submissions as proof of filing.

The FEC's next open meeting, currently scheduled for April 12, will be held at the new office.

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At issue in the Second and Ninth Circuit cases is the requirement for nonprofit organizations to register with state regulators in order to solicit donations in those states. Charitable organizations formed under Section 501(c)(3) of the federal tax code are generally required to register. Many state regulators also take the position that Section 501(c)(4) social welfare organizations must register, although the state laws are often quite unclear in this respect.

Registered nonprofit organizations typically are required to file an annual report or a copy of their IRS Form 990 tax return with the state authorities. Most states do not require organizations to submit Schedule B of Form 990, which contains a sensitive list of an organization's donors. (In fact, some states affirmatively remind organizations not to file this schedule.) Unlike the other parts of the Form 990, which are required to be made publicly available, Schedule B is considered to be so sensitive that it is filed on a confidential basis with the IRS, and the tax code imposes stiff penalties for its unauthorized release.

Notwithstanding the widely recognized confidentiality of Schedule B, the New York and California state Attorneys General in recent years have started demanding that nonprofit organizations registered in those states include Schedule B when submitting copies of their Form 990. The New Jersey state Attorney General also reportedly has recently begun making such demands.

Citizens United, a 501(c)(4) organization, and its related 501(c)(3) entity Citizens United Foundation, resisted these efforts in New York. They sued state Attorney General Eric Schneiderman in federal court for violating the organizations' First Amendment right to associational privacy, among other legal theories. After the district court decided for the Attorney General, the Citizens United entities appealed the ruling to the Second Circuit.

As an initial matter, the Second Circuit determined that the proper framework for judicial review of this issue was "exacting scrutiny." Under this standard, a disclosure law is constitutional if there is a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." A plaintiff challenging a disclosure requirement under this framework can prevail only if it can demonstrate a "likelihood of a substantial restraint upon the exercise by [its] members of their right to freedom of association" that outweighs the government's interest in disclosure.

As for the purported governmental interest here, the New York Attorney General argued that the Schedule B information aids his office in detecting self-dealing. Specifically, donors to nonprofit organizations may not personally benefit from their donations. The Attorney General argued that "[k]nowing the source and amount of large donations can reveal whether a charity is ... doing business with an entity associated with a major donor." The Attorney General further argued that the Schedule B information aids his office in detecting "intentional[] overstatement[s of] the value of noncash donations in order to justify excessive salaries or perquisites for its own executives."

The Second Circuit panel accepted the Attorney General's purported justifications, notwithstanding some flaws and strong arguments to the contrary. (In two places, the panel's opinion also appeared to confuse Citizens United Foundation, the 501(c)(3) entity, with Citizens United, the 501(c)(4) entity.) For example, the Schedule B information likely does not help state

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# We Are Pleased to Welcome Lee Goodman

Wiley Rein LLP welcomes Lee E. Goodman, former Chairman and Commissioner of the Federal Election Commission (FEC), as a partner in our renowned **Election Law & Government Ethics Practice**. Nationally recognized for his experience in close elections, recounts, and election administration, Mr. Goodman will advise clients on laws regarding political activities and free speech.

Mr. Goodman was presidentially appointed to the FEC on October 21, 2013, after the U.S. Senate confirmed his nomination by unanimous consent. He served as Chairman of the FEC in 2014 and Vice Chairman in 2013. During his years on the Commission, Mr. Goodman promoted free speech on the Internet; vigorous free press rights, including for new media; and practical deregulation of political parties.

Prior to joining the FEC, Mr. Goodman was in private practice, including two stints at Wiley Rein. He advised several presidential campaigns, and served as general counsel of the Republican Party of Virginia from 2009 to 2013. His prior government service includes four years as legal counsel and policy advisor to the Governor of Virginia, and three years as counsel and special assistant to the Attorney General of Virginia. He also served as chief advisor to the Chairman of the Congressional Advisory Commission on Electronic Commerce.

Mr. Goodman has authored several articles on election law, including a chapter on regulation of political speech on the Internet in the book *Law and Election Politics – The Rules of the Game*, and frequently lectures on election law topics. He has served on the boards of several political, educational, and cultural nonprofit organizations. He received his B.A., with highest distinction, from the University of Virginia, and his J.D. from the University of Virginia School of Law, where he served as articles editor for the *Journal of Law & Politics*.

## Plan Ahead: Annual New Jersey Pay-to-Play Filing Due April 2!

Business entities that in 2017 received $50,000 or more in contracts with state or local government agencies in New Jersey must file an annual disclosure statement of political contributions with the New Jersey Election Law Enforcement Commission by April 2, 2018.

This "Business Entity Annual Statement" (Form BE) requires electronic reporting of cash contributions of any amount and non-cash contributions in excess of $300 to a long list of campaign, party, and political committees. Reportable contributions include those made by the business entity, the owners of more than 10% of the business entity; principals, partners, officers, directors, and trustees of the business entity (and their spouses); subsidiaries directly or indirectly controlled by the business entity; and a continuing political committee that is directly or indirectly controlled by the business entity.

Reports are due even if no reportable contributions have been made. For more information, see the **New Jersey Election Law Enforcement Commission website**. Wiley Rein has extensive experience with this annual report as well as with the labyrinth of other pay-to-play laws in New Jersey and elsewhere around the country. ■

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### *IRS Releases New Tax-Exempt Application for 501(c)(4) Organizations*

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Taxation stated that Congress intended to create a new, separate form for 501(c)(4) organizations clarifying that requesting determination letters of tax-exempt status is optional. While the IRS does not require 501(c)(4) organizations to apply (except in certain exceptional cases) for tax exemption the way it does for many 501(c)(3) organizations, 501 (c)(4) organizations will often still opt to receive official recognition of their exempt status up front. Submitting Form 1024-A does not, however, eliminate the existing requirement for organizations to notify the IRS within 60 days of formation that they are operating as a 501(c)(4) by filing Form 8976, *Notice of Intent to Operate Under Section 501(c)(4)*.

Form 1024 will continue to be used for other non-501(c)(3) organizations applying for recognition of exempt status, such as 501(c)(5), (c)(6), and (c)(7) organizations. ■

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to just one call or message. After all, there is no guarantee that one call will alert the caller that the phone number dialed has been reassigned and reasonable reliance would carry over to the next call. The Court also noted that the desire to give a caller the opportunity to learn of a reassigned number, and the desire to have callers bear the risk for calls made to reassigned numbers could not justify the one-call safe harbor.

In setting aside the safe harbor, the Court also decided to overturn the FCC's entire interpretation of calls to reassigned numbers. Without a safe harbor, the FCC's interpretation would create strict liability for when a caller calls a reassigned number, even if the caller has no knowledge of the reassignment. The Court did not believe that the FCC would have adopted such a severe rule, therefore vacated the entire rule. It also noted the current FCC proceeding on establishing a reassigned numbers database could address the issues raised by the safe harbor. The proposals to create a reassigned number database and a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information could "bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission's principle of reasonable reliance."

Next, the Court reviewed and upheld the Commission's ruling that a called party may revoke consent at any time and through any reasonable means (orally or in writing) that clearly expresses a desire not to receive further messages. It found that the ruling would not require carriers to implement burdensome systems or processes, and a standardized opt-out procedure, such as the specific opt-out mechanisms required for banking or healthcare-related calls, are only necessary for those calls because of their importance and should not apply to all calls. The Court further noted that the FCC's ruling does not affect parties' ability to select a particular revocation procedure by agreement.

Finally, the Court considered the FCC's decision to exempt urgent healthcare calls to wireless numbers from the prior-express consent requirement. The TCPA permits the Commission to exempt from the consent requirement "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). The Commission found that some, but not all, healthcare-related calls justify an exemption because of their urgency. Rite Aid Pharmacy challenged this decision. As a threshold matter, the Court first considered whether Rite Aid could even mount its challenge. Rite Aid did not file its own petition in the FCC's proceeding, although it did file comments in support of another's. The Court held that those comments granted Rite Aid "party aggrieved" status to challenge the FCC's Order, because the comments provided the FCC an opportunity to consider Rite Aid's position.

On the merits of the challenge, the Court upheld the FCC's exemption. First, it found that the exemption did not conflict with HIPAA-permitted communications. Next, the Court found that the Commission's decision to adopt a narrower exemption for healthcare-related calls to wireless numbers than what the Commission's rules provide for such calls to landline numbers was not arbitrary and capricious. The TCPA, it reasoned, presupposes that landline and wireless numbers warrant different treatment. Finally, the Court held that the FCC did not act arbitrarily by exempting only certain healthcare-related calls. Rite Aid could not identify any emergency healthcare calls that were not included in the exemption.

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regulators discern whether a nonprofit organization's transactions benefit donors unless the regulators also are able to recognize that the specific payees listed on an organization's Form 990 are associated with those donors – which is unlikely.

Moreover, the types of self-dealing the New York Attorney General purports to be concerned with are already required to be reported on Schedule L (transactions with "interested persons"). If an unscrupulous nonprofit organization fails to disclose self-dealing on Schedule L, it is also likely to falsify information on Schedule B to conceal such transactions. As to the Attorney General's purported justification for the need to know about an organization's non-cash donations and excessive pay and perks to an organization's executives, that information is also already required to be reported on Schedules M ("noncash contributions") and L, respectively. In short, the Schedule B information appears to be unnecessary to the Attorney General because both of the types of information he purports to obtain from the schedule is already required to be reported on other Form 990 schedules.

In fact, in the California litigation – which was brought by another 501(c)(3) entity, Americans for Prosperity Foundation – testimony from employees in the California Attorney General's office revealed that they essentially never use Schedule B information when auditing or investigating nonprofit organizations. On the witness stand, these same employees attempted to claim they have used Schedule B information to initiate only three investigations since 2012, but on cross-examination they acknowledged that the initial source of information for even those three investigations

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## Events & Speeches

### *Ethics in State Government Affairs*

**April 12, 2018 | Salt Lake City, UT**

***State Government Affairs Council 2018 National Summit***

**Carol A. Laham, Moderator**

### *Procurement Advocacy*

**April 12, 2018 | Salt Lake City, UT**

***State Government Affairs Council 2018 National Summit***

**Carol A. Laham, Speaker**

### *Government Contractors Forum: Lobbying Do's and Don't's for Government Contractors: Our Unique Regulatory Environment*

**April 18, 2018 | McLean, VA**

***Association of Corporate Counsel National Capital Region***

**Caleb P. Burns, Presenter, George E. Petel, Presenter**

### *ANALYSIS: Citizens United, Part 2? Controversial Second Circuit Ruling Sets Up Potential Supreme Court Fight Over Donor Privacy* *continued from page 10*

actually originated elsewhere. In addition, the California Attorney General's office had not requested the plaintiff organization's Schedule B's for more than a decade – a fact that the district court judge found to undercut the state's purported argument that such information was useful or essential to the state's regulatory function. (In the Citizens United case, the New York Attorney General similarly had not requested the entities' Schedule B's for more than 15 years, but the Second Circuit judges were unmoved by this fact.)

Ultimately, the most significant distinction between the California case – in which the district court judge ruled against the California Attorney General – and the New York case may be evidentiary. In the California case, Americans for Prosperity Foundation had produced significant evidence and testimony of threats, harassment, intimidation, and retaliation against the organization's donors, employees, and supporters, such that the filing of the plaintiff's Schedule B with state authorities likely would deter donors from giving to the group. The district court judge also found "indefensible" the almost 2,000 Schedule B's that had been posted on the website of the California Department of Justice, even though the information was supposed to be kept confidential. These facts were absent in the New York case. On the other hand, an organization's donors, supporters, and employees arguably should not have to be subject to harm before the organization may be free from compelled disclosure of its donors.

The Citizens United plaintiffs have 90 days from the entry of the Second Circuit's February 15 ruling to seek a writ of certiorari for Supreme Court review. Meanwhile, the California case was appealed by the California Attorney General to the Ninth Circuit, where it has been awaiting a decision for more than a year. ■

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### *D.C. Circuit Releases Its Long-Awaited TCPA Decision - Could Affect Political Robocalls* *continued from page 9*

*[1] The Court also noted that the FCC's interpretation of "make any call using any" ATDS was broad and that the term could be read more narrowly, as Commissioner Michael O'Rielly suggested in the Order. A narrower reading could assuage the concerns raised by the expansive interpretation of "capacity," but that challenge was not raised so the Court took no position.*

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**Not admitted to the DC bar. Supervised by the principals of the firm.*

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