

expressly tied to political goals, the organization will not be a qualified nonprofit corporation. However, paragraph (b)(2)(i) contains an exception to this rule. If a corporation's organic documents indicate that the corporation was formed for the promotion of political ideas and "any lawful purpose" or "any lawful activity," the latter statement will not preclude a finding under paragraph (c)(1) that the corporation's only express purpose is the promotion of political ideas. The Commission recognizes that it is common for corporations to use boilerplate purpose statements elicited from their state's incorporation statute when they prepare their articles of incorporation. These statements will not prevent such an organization from being a qualified nonprofit corporation.

One commenter objected to including those purposes evidenced by the activities in which the corporation actually engages. The commenter argued that this rule would allow the Commission to analyze the motives behind the corporation's activities.

The Commission has decided to include this provision in the final rules. Generally, corporations engage in activities that further the goals of the corporation. Thus, the corporation's activities tend to provide a more objective and complete indication of the corporation's reasons for existing. In contrast, if the Commission could look only to a corporation's organic documents for the corporation's purpose, a corporation with an appropriate purpose statement in its organic documents would be exempt from the independent expenditure prohibition, regardless of whether the activities in which it actually engages were consistent with its stated purpose or with the exemption recognized in the *MCFL* opinion.

The Commission does not intend to engage in extensive speculation about the motivations of qualified nonprofit corporations. However, it is necessary for the Commission to consider the activities in which a corporation actually engages in order to completely assess the corporation's purpose.

*c. Business activities.* Paragraph (b)(3) defines the term "business activities" for the purposes of these rules. Under paragraph (b)(3), "business activities" generally includes any provision of goods and services that results in income to the corporation. It also includes any advertising or promotional activity that results in income to the corporation, other than in the form of membership dues or donations. Thus, a corporation that publishes a newsletter or magazine and sells advertising space

in that publication will be engaging in business activities, and will not be a qualified nonprofit corporation.

However, the definition specifically excludes fundraising activities that are expressly described as requests for donations that may be used for political purposes, such as supporting or opposing candidates. Fundraising activities conducted under these circumstances will not be considered business activities under these rules.

This definition reflects a critical distinction made by the Supreme Court in *MCFL*. The definition includes those activities that closely resemble the commercial activities of a business corporation because these activities generate financial resources that, like those of a business corporation, "are not an indication of popular support for the corporation's political ideas" \* \* \* [but] reflect instead the economically motivated decisions of investors and customers." 479 U.S. at 258. Thus, these "resources amassed in the economic marketplace" can create "an unfair advantage in the political marketplace." *Id.* at 257.

In contrast, the definition specifically excludes activities that generate resources that reflect "popular support for the corporation's political ideas." *Id.* at 257. Fundraising activities that are described to potential donors as requests for donations that will be used for political purposes will generate donations that reflect popular support for the corporation's political ideas. Consequently, they do not pose the risk of giving the corporation an unfair advantage in the political marketplace.

In some cases, the fundraising activities of a qualified nonprofit corporation closely resemble business activities in that they involve a provision of goods that results in income to the corporation. For example, a qualified nonprofit corporation may sell T-shirts or calendars in order to generate funds to support its political activity. *MCFL* itself held garage sales, bake sales and raffles to raise funds for these purposes. However, if the corporation discloses that the activities are an effort to raise funds for its political activities, such as supporting or opposing candidates, the activities will not be considered business activities for the purposes of these rules, notwithstanding their close resemblance to ordinary business transactions. "This ensures that political resources reflect political support." *NCFL* at 264.

The Commission notes that this exclusion is limited to direct fundraising by the corporation. If a corporation sells items through a third party, such as a retail store or catalog

mail order outlet, this will generally be considered a business activity, even if the item is accompanied by a notification that a portion of the proceeds will be used to support the corporation's political activities. The sale of items by a third party that is not a qualified nonprofit corporation justifies the application of the independent expenditure prohibition.

*d. Shareholders.* Paragraph (b)(4) states the term "shareholder" has the same meaning as the term "stockholder," as defined in section 114.1(h) of the Commission's current rules.

#### 4. The Essential Features

The Supreme Court said "*MCFL* has three features essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending." *MCFL* at 263-64. These features have been incorporated into paragraph 114.10(c) of the final rules. A qualified nonprofit corporation is a corporation that has all the characteristics set out in this paragraph. Corporations that do not have all of these characteristics are not qualified nonprofit corporations, and therefore are bound by the independent expenditure prohibition.

*a. Purpose.* Paragraph (c)(1) states that a qualified nonprofit corporation is one whose only express purpose is the promotion of political ideas. In other words, if a corporation's organic documents, authorized agents, and actual activities indicate that its purpose is issue advocacy, election influencing activity, or research, training or other activity expressly tied to the organization's political goals, the corporation may be a qualified nonprofit corporation. However, if the documents, agents or activities indicate any other purpose, the corporation will be subject to the independent expenditure prohibition.

As indicated above, the rules contain an exception for boilerplate purpose statements in a corporation's organic documents. If a corporation's organic documents indicate that the corporation was formed for the promotion of political ideas and "any lawful purpose" or "any lawful activity," the latter statement will not preclude a finding under paragraph (c)(1) that the corporation's only express purpose is the promotion of political ideas.

One commenter argued that requiring the promotion of political ideas to be an organization's only express purpose would exclude organizations that do educational and research work on political topics with which they are concerned. It would also exclude