

organizations that train people in advocacy techniques, an important part of the activities of many nonprofit corporations. The Commission has addressed these concerns by broadening the definition of the phrase "the promotion of political ideas" in paragraph (b)(1) to include these activities. This definition is discussed in detail above.

b. Business activities. Under paragraph (c)(2), a corporation must be unable to engage in business activities in order to be a qualified nonprofit corporation. Paragraph (c)(2) tracks the language of the *MCFL* decision in that it limits the exemption to corporations that cannot engage in business activities. Thus, in order to be exempt, business activities must be proscribed by the corporation's organic documents or other internal rules.

However, as indicated above, fundraising activities that are expressly described as requests for donations to be used for political purposes are not business activities. Consequently, a qualified nonprofit corporation can engage in fundraising activities without losing its exemption, so long as it makes the appropriate disclosure.

Most of the commenters objected to a complete prohibition on business activities. One commenter argued that the presence of minimal business activities would not have changed the result in *MCFL*. This commenter said that, despite the Supreme Court's reliance on the absence of business activities, a prohibition should not be read into the opinion, since it would unreasonably limit the activities of these organizations.

However, the plain language of the *MCFL* opinion endorses a complete prohibition on business activities. The Court said "MCFL has three features essential to our holding that it cannot constitutionally be bound by § 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264 (emphasis added). This statement clearly supports a total ban on business activities.

In addition, other parts of the opinion make it clear that the Court based its conclusion on the complete absence of any business activities, and strongly suggest that the presence of business activities would have changed the result. Earlier, the Court said that "the concerns underlying the regulation of corporate political activity are simply absent with regard to *MCFL*. It is not the case * * * that *MCFL* merely poses less of a threat of the danger that has

prompted regulation. Rather, it does not pose such a threat at all." 479 U.S. at 263. In order to pose no such threat, a corporation must be free from resources obtained in the economic marketplace. Only those corporations that cannot engage in business activities are free from these kinds of resources.

This approach will not unreasonably limit the activities of a qualified nonprofit corporation. The corporation has at least two options for generating revenue under the final rules. First, the corporation can engage in unlimited fundraising activities, so long as it informs potential donors that it is seeking donations that will be used for political purposes, such as supporting or opposing candidates. Second, the corporation can establish a separate segregated fund and make its independent expenditures exclusively from that fund.

Several other commenters also felt that a limited amount of business activity should be allowed, and argued that the Commission should incorporate the tax law concepts of related and unrelated business activity into the final rules. Under this approach, income from activity that is related to the corporation's mission would not be considered business activity, and as such, would not affect its qualified nonprofit corporation status. In addition, qualified nonprofit corporations would be permitted to engage in some unrelated business activity, so long as it does not become the organization's primary purpose.

However, reliance on these tax law concepts would be inappropriate here because the tax code was drafted to serve different purposes. Section 501(c)(4) of the tax code grants tax exempt status to organizations that promote the social welfare. In exercising its administrative discretion, the Internal Revenue Service has concluded that it is appropriate to allow social welfare organizations to engage in some unrelated business activity so long as it does not become their primary purpose, apparently believing that a limited amount of business activity is not incompatible with the promotion of social welfare.

In contrast, section 441b seeks to prevent the use of resources amassed in the economic marketplace to gain an unfair advantage in the political marketplace. The *MCFL* Court concluded that a complete prohibition on the use of resources amassed in the economic marketplace is necessary to serve this purpose. Thus, the Commission has incorporated this prohibition into the final rules.

c. Shareholders/disincentives to disassociate. The second feature that distinguished *MCFL* from other corporations was that "it ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings." 479 U.S. at 264. The Supreme Court said this "ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id.* Later, in *Austin*, the Court said that persons other than shareholders may also face disincentives to disassociate with the corporation. "Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs. * * * The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter." 494 U.S. at 663.

These characteristics have been incorporated into paragraph (c)(3) of the final rules. In the interests of clarity, the rules separate these two characteristics into separate subparagraphs. Only those corporations that have the characteristics set out in both subparagraphs are exempt from the independent expenditure prohibition.

i. Shareholders. Under paragraph (c)(3)(i), a qualified nonprofit corporation is one that has no shareholders or other persons affiliated in a way that could allow them to make a claim on the organization's assets or earnings. Thus, if any of the persons affiliated with a corporation have an equitable or ownership interest in the corporation, the corporation will not be a qualified nonprofit corporation.

One commenter said the limitation on persons with claims against the corporation is unnecessary, and also said it should be coupled with an explanation that this restriction will not deprive a corporation of the right to have dues-paying members.

The Commission believes this limitation is necessary to ensure that associational decisions are based entirely on political considerations. However, this limitation will not adversely affect corporations with dues-paying members. In most cases, dues payments are not investments made with an expectation of return or repayment. They do not give members any right to the corporation's assets or earnings. Consequently, the existence of