



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Election Commission TITLE-SERIES: 146-01

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: CORPORATE AND MEMBERSHIP
ORGANIZATION POLITICAL ACTIVITY

CITE STATUTORY AUTHORITY: W. Va. Code 3-8-8

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/28/2023 9:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Donald Kersey

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Charleston, WV 25305

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule establishes general regulations on corporate and membership organization political activity.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

SB 516 (2023) amended the Election Code to, in part, clarify the definitions of corporate, unaffiliated, and membership organization political action committees. The changes to the rule reflect those statutory clarifications.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

N/a

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

N/a

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

N/a

D. FISCAL NOTE DETAIL:

| Effect of Proposal | Fiscal Year | | |
|------------------------------------|--|--|--|
| | 2023 Increase/Decrease (use "-") | 2024 Increase/Decrease (use "-") | Fiscal Year (Upon Full Implementation) |
| 1. Estimated Total Cost | | | |
| Personal Services | | | |
| Current Expenses | | | |
| Repairs and Alterations | | | |
| Assets | | | |
| Other | | | |
| 2. Estimated Total Revenues | | | |

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

N/a

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Donald Kersey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 146
LEGISLATIVE RULE
ELECTION COMMISSION

SERIES 1
CORPORATE AND MEMBERSHIP ORGANIZATION POLITICAL ACTIVITY

§146-1-1. General.

1.1. Scope. -- ~~These~~is Rules ~~establishes~~ the general ~~rules~~ regulations on corporate and membership organization political activity.

1.2. Authority. -- W. Va. Code § 3-8-8.

1.3. Filing Date. -- ~~May 5, 2020~~.

1.4. Effective Date. -- ~~May 5, 2020~~.

1.5. Sunset Provision. -- This Rule shall terminate and have no further force or effect ~~May 5, 2025~~
August 1, 2028.

§146-1-2. Definitions.

2.1. "Candidate's committee" means a political committee established with the approval of or in cooperation with a candidate or a prospective candidate to explore the possibilities of seeking a particular office or to support or aid his or her nomination or election to an office in an election cycle. If a candidate directs or influences the activities of more than one active committee in a current campaign, those committees shall be considered one committee for the purpose of contribution limits.

2.2. "Contribution" means a gift, subscription, loan, assessment, payment for services, dues, advance, donation, pledge, contract, agreement, forbearance, promise of money, or other tangible thing of value, whether conditional or legally enforceable, or a transfer of money or other tangible thing of value to a person, made for the purpose of influencing the nomination, election, or defeat of a candidate.

2.2.1. A coordinated expenditure is a contribution for the purposes of this rule. "Coordinated expenditure" is an expenditure made in concert with, in cooperation with, or at the request or suggestion of a candidate or candidate's committee and meeting the criteria provided in W. Va. Code § 3-8-9a.

2.2.2. An offer or tender of a contribution is not a contribution if expressly and unconditionally rejected or returned. A contribution does not include volunteer personal services provided without compensation: *Provided*, that a nonmonetary contribution is to be considered at fair market value for reporting requirements and contribution limitations.

2.3. "Corporate Political Action Committee" means a political action committee that is a separate segregated fund of a corporation that ~~comes into existence by specific written authorization of the Board of Directors, or equivalent governing body, of one (1) or more corporation(s) the purpose of which is to solicit funds for, and make expenditures and contributions on behalf of political committees as defined herein. may only accept contributions from its restricted group as outlined in this Rule.~~

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2.4. "Corporation" means any separately incorporated entity, whether under the laws of West Virginia or any other state or any foreign country. The term corporation covers both for-profit and nonprofit corporations and includes nonstock corporations, incorporated membership organizations, incorporated cooperatives, incorporated trade associations, professional corporations and, under certain circumstances, limited liability companies.

A political committee may incorporate and not be subject to the definition of a corporation within this rule if the political committee incorporates for liability purposes only, and if the organization is properly registered as political committee with the appropriate filing officer. Notwithstanding the corporate status of the political committee, the treasurer of an incorporated political committee remains personally responsible for carrying out their respective duties under this rule.

2.5. "Election Officer" means the officer or official who receives the Statement of Organization of a political committee, and includes the Secretary of State, the county clerk, and the municipal clerk or recorder, as set forth in W. Va. Code § 3-8-4.

2.6. "Executive or Administrative Personnel" means individuals employed by a corporation who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional or supervisory responsibilities.

2.6.1. This definition includes:

2.6.1.a. The individuals who run the corporation's business such as officers, other executives and plant, division and section managers; and

2.6.1.b. Individuals following the recognized professions, such as lawyers and engineers.

2.6.2. This definition does not include:

2.6.2.a. Professionals who are represented by a labor organization;

2.6.2.b Salaried foremen and other salaried lower-level supervisors having direct supervision over hourly employees;

2.6.2.c. Former or retired personnel who are not stockholders; or

2.6.2.d. Individuals who may be paid by the corporation, such as consultants, but who are not employees, within the meaning of 26 CFR 31.3401(c)-1 of the corporation for the purpose of income withholding tax on employee wages under Internal Revenue Code of 1954, § 3402.

2.6.3. Individuals on commission may be considered executive or administrative personnel if they have policymaking, managerial, professional or supervisory responsibility and if the individuals are employees within the meaning of 26 CFR 31.3401(c)-1 of the corporation for the purpose of income withholding tax or employee wages under the Internal Revenue Code of 1954, § 3402.

2.6.4. The Fair Labor Standards Act, 29 U.S.C. 201, et seq. and the regulations issued pursuant to that Act, 29 CFR 541, may serve as a guideline in determining whether individuals have policymaking, managerial, professional or supervisory responsibilities.

2.7. "Families" means spouses and unemancipated children.

2.8. "Membership organization" means a group that grants bona fide rights and privileges, such as the right to vote, to elect officers or directors, and the ability to hold office to its members and which uses

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a majority of its membership dues for purposes other than political purposes. "Membership organization" does not include organizations that grant membership upon receiving a contribution.

2.9. "Membership organization political action committee" means a labor organization or a trade association, cooperative or other incorporated membership organization that: is composed of members; expressly states the qualifications for membership in its articles and by-laws; makes its articles, by-laws and other organizational documents available to its members; expressly seeks members; acknowledges the acceptance of membership, such as by sending membership cards to new members or including them on a membership newsletter list; and is organized as a separate segregated fund of the membership organization primarily for the purpose of influencing any election on the ballot in the State of West Virginia.

2.9.1 "Unaffiliated political action committee" means a political action committee that is not affiliated with a corporation or a membership organization.

2.10. "Person" means any individual, partnership, committee, association, corporation and any other organization or group of persons.

2.11. "Political Action Committee" means a committee organized by one or more persons, the primary purpose of which is to support or oppose the nomination or election of one or more candidates. The following are types of political action committees:

2.11.1. A corporate political action committee, as that term is defined by Subsection 2.3 of this Rule;

2.11.2. ~~A political action committee established as a separate segregated fund by a membership organization;~~ A membership organization political action committee, as that term is defined by Subsection 2.9 of this rule; and

2.11.3. An unaffiliated political action committee, as that term is defined by Subdivision 2.9.1.

2.12. "Political Committee" means any candidate committee, political action committee or political party committee.

2.13. "Political Party Committee" means a committee established by a political party or political party caucus for the purposes of engaging in the influencing of the election, nomination or defeat of a candidate in any election.

2.14. "Political purposes" means any of the following:

2.14.1. Expressly advocating or opposing the nomination, election or defeat of one or more candidates;

2.14.2. Supporting the administration or activities of an established political party, political party caucus or an organization which has declared itself a political party or political party caucus;

2.14.3. Supporting the administration or activities of a political committee determining the advisability of becoming a candidate under the pre-candidacy financing provisions; or

2.14.4. Supporting the retirement of the debt of a candidate or political committee incurred for any of the purposes set forth in this Section.

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2.14.5. Making allowable contributions to political committees in accordance with the applicable limits of the law and this Rule.

2.15. "Restricted Group" means stockholders and their families, and executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families, of a corporation or membership organization, or when applicable, the members of an incorporated association or organization or group of persons, and the stockholders and their families, and executive and administrative personnel and their families, of such members.

2.16. "Separate segregated fund" created for, but not limited to, political purposes to engage on behalf of members of a corporation. This fund, whether meeting the definition of a PAC or not, is restricted from receiving corporate or membership organization contributions.

2.17. "Stockholder" means a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted (if it is voting stock), and has the right to receive dividends.

§146-1-3. General Prohibition.

3.1. Except as permitted below by this rule, no officer of any corporation or membership organization, or agent or person, on behalf of such corporation or membership organization, shall directly or indirectly make, or authorize to be made, or consent to a contribution to any political committee or a coordinated expenditure in connection with election to any local or state office, or in connection with any primary election or political convention or caucus held to select candidates for any local or state office.

3.2. No candidate, political committee or any other person shall knowingly accept or receive any payment prohibited by this section.

3.3. No corporation or membership organization shall facilitate the making of contributions as further described in this Section:

3.3.1. Corporations and membership organizations (including officers, directors or other representatives acting as agents of corporations or membership organizations) are prohibited from facilitating the making of contributions to candidates or political committees, other than to the political action committee that is a separate segregated funds of the corporations or membership organizations. Facilitation means using corporate or membership organization resources or facilities to engage in fundraising activities in connection with any candidate for election. A corporation or membership organization does not facilitate the making of a contribution to a candidate or political committee if it provides goods or services in the ordinary course of its business as a commercial vendor in accordance with W. Va. Code § 3-8-9 at the usual and normal charge.

3.3.2. Examples of facilitating the making of contributions include but are not limited to:

3.3.2.a. Fundraising activities by corporations and membership organizations (except commercial vendors):

3.3.2.a.1. Officials or employees of the corporation and membership organizations ordering or directing subordinates or support staff (who therefore are not acting as volunteers) to plan, organize or carry out the fundraising project as a part of their work responsibilities using corporate or membership organization resources, unless the corporation or membership organization receives advance payment for the fair market value of such services;

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3.3.2.a.2. Failure to reimburse a corporation or membership organization within a commercially reasonable time for the use of corporate or membership organization facilities in connection with such fundraising activities;

3.3.2.a.3. Using a corporate or membership organization list of customers, clients, vendors or others who are not in the restricted group to solicit contributions or distribute invitations to the fundraiser, unless the corporation or membership organization receives advance payment for the fair market value of the list;

3.3.2.a.4. Using meeting rooms that are not customarily made available to clubs, civic or community organizations or other groups; or

3.3.2.a.5. Providing catering or other food services operated or obtained by the corporation or membership organization, unless the corporation or membership organization receives advance payment for the fair market value of the services;

3.3.2.b. Providing materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes addressed to a candidate or political committee other than the corporation's or membership organization's separate segregated fund, or other similar items which would assist in transmitting or delivering contributions, but not including providing the address of the candidate or political committee;

3.3.2.c. Soliciting contributions earmarked for a candidate that are to be collected and forwarded by the corporation's or membership organization's separate segregated fund, except to the extent such contributions also are treated as contributions to and by the separate segregated fund; or

3.3.2.d. Using coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee.

3.3.3. Facilitating the making of contributions does not include the following activities if conducted by a separate segregated fund:

3.3.3.a. Any activity specifically permitted under W. Va. Code § 3-8-9, including soliciting contributions to a political committee, and making in kind contributions to a political committee; and

3.3.3.b. Collecting and forwarding contributions earmarked to a candidate in accordance with 3.3.b.3. of this section.

3.3.4. Facilitating the making of contributions also does not include the following activities if conducted by a corporation or membership organization:

3.3.4.a. Enrolling members of a corporation's or membership organization's restricted group in a payroll deduction plan or check-off system which deducts contributions from dividend or payroll checks to make contributions to the corporation's or membership organization's separate segregated fund, checkoff system or an employee participation plan, and are subject to the solicitation requirements of W. Va. Code § 3-8-8;

3.3.4.b. Soliciting contributions to be sent directly to candidates if the solicitation is directed to the restricted group; and

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3.3.4.c. Soliciting contributions earmarked for a candidate that are to be collected and forwarded by the corporation's or membership organization's separate segregated fund, to the extent such contributions also are treated as contributions to and by the separate segregated fund.

3.3.5. Facilitating the making of contributions also does not include the provision of incidental services by a corporation or membership organization to collect and forward contributions from its employee stockholders and executive and administrative personnel to the separate segregated fund of a trade association of which the corporation or membership organization is a member, including collection through a payroll deduction or check-off system.

3.3.6. Any use of corporate or membership organization property as described in Sections 4.3 and 4.4 of this Rule is conditioned on such corporation or membership organization also permitting any group of employees represented by a corporate political action committee or membership organization political action committee registered with either the Secretary of State of West Virginia or the Federal Election Commission, to use, without reimbursement, the real property of such corporation or membership organization solely to establish, administer and solicit contributions to such corporate political action committee or membership organization political action committee. No such group of employees may use any such real property in such a manner as to significantly disrupt the normal operations or activities of the corporation or membership organization.

3.3.6.a. A corporation or membership organization is prohibited from soliciting any contributions by use or threat of any physical force, job discrimination, financial reprisals or as a condition of employment, or by paying any contributor for his or her contribution through a bonus, expense account or other form of direct or indirect compensation.

3.3.6.b. Any person soliciting for a contribution to a separate segregated fund of a corporation or membership organization must, at the time of the solicitation, inform the person or member being solicited of the political purposes of such separate segregated fund of a corporation or membership organization.

3.3.6.c. Any person soliciting for a contribution to a separate segregated fund of a corporation or membership organization must at the time of the solicitation inform the person or member being solicited of the right to refuse to so contribute without any reprisal.

3.3.6.d. A guideline for contributions may be suggested, and not enforced by any direct or indirect means: *Provided*, that the person soliciting, or the solicitation, informs the person being solicited:

3.3.6.d.1. That the guidelines are merely suggestions; and

3.3.6.d.2. That a person is free to contribute more or less than the guidelines suggest and that the corporation or membership organization will not favor or disadvantage anyone by reason of the amount of their contribution or their decision not to contribute.

3.3.6.e. Any written solicitation for a contribution to a separate segregated fund of a corporation or membership organization must contain statements which comply with the requirements of paragraph (2) and (3) of this subdivision, and if a guideline is suggested, statements which comply with the requirements of paragraph (4) of this subdivision.

3.3.6.f. Subject to this rule, a corporation or membership organization may, in making solicitations aimed solely at its restricted group for contributions to its separate segregated fund of a corporation or membership organization, utilize a payroll deduction plan, checkoff system or other plan which deducts contributions from dividend or payroll checks of its restricted group.

3.3.6.g. Accidental or inadvertent solicitation by a corporation or membership organization, of persons beyond those whom it is permitted to solicit, will not be deemed a violation, provided that the corporation or membership organization has used its best efforts to comply with the limitations regarding the persons it may solicit and that the method of solicitation is corrected forthwith after the discovery of such erroneous solicitation.

§146-1-4. Exceptions.

The provisions of Section 3 of this rule shall not be deemed to prohibit:

4.1. Expenditures made for public editorials or commentaries produced in the ordinary course of business by corporations whose primary purpose is journalism or public communications.

4.2. Direct communications by a corporation or membership organization to its restricted group on any subject by any means not intended to reach the general public. Such communications by a corporation or membership organization to its restricted group may be made by, but are not limited to, the following means:

4.2.1. The distribution of printed material by a corporation or membership organization to its restricted group: *Provided*, that:

4.2.1.a. The material is disseminated at the expense of the corporation or membership organization; and

4.2.1.b. The material clearly states that it constitutes a communication of the views of the corporation or membership organization.

4.2.2. The allowing of a candidate or party representative to address the restricted group of the corporation or membership organization at any meeting, convention or other regularly scheduled function of the corporation or membership organization which is primarily held for other purposes. The corporation or membership organization shall pay no compensation whatsoever to such candidates. The candidate or party representative may address members of the restricted group in their individual rather than corporate or membership organization capacities, and may at such time ask for individual contributions to his or her campaign or party, ask that such contributions to be sent to his or her campaign or party, or ask that contributions to a separate segregated fund of a corporation or membership organization be designation for his or her campaign or political party committee.

4.2.3. The establishment and operation of phone banks by a corporation or membership organization to communicate with its restricted group urging them to register and/or vote for a particular candidate or candidates.

4.2.4. The conducting of nonpartisan registration and get-out-the-vote drives, as by providing transportation to the polls, by a corporation or membership organization aimed at its restricted group. If a registration drive is undertaken, assistance in registering or voting may not be withheld or refused on a partisan basis, and if transportation or other services are offered in connection with a registration or get-out-the-vote drive, such transportation or services may not be withheld or refused on a partisan basis.

4.3. Establishment and administration of a separate segregated fund of a corporation or membership organization. A separate segregated fund of a corporation or membership organization or persons acting on its behalf may, subject to the authorization of such corporation or membership organization, use the real or personal property, facilities and equipment of any corporation that participated in the establishment or participates in the administration or solicits contributions on behalf of such separate

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segregated fund of a corporation or membership organization. The cost of such use of property, real or personal, facilities or equipment need not be reimbursed to the corporation so long as such costs are incurred in setting up and running the separate segregated fund of a corporation or membership organization. Such costs that need not be reimbursed include the costs of office space, phones, utilities and supplies.

4.4. Use of corporate facilities by other persons.

4.4.1. A corporation or membership organization may, at its discretion, allow use of its real or personal property, facilities or equipment beyond such uses as described in Section 4.3 of this Rule, in connection with any political activity by any person. However, the cost of any such use of corporate or membership organization property, real or personal, facilities or equipment under this rule must be reimbursed to the corporation or membership organization within a commercially reasonable time, at normal and usual commercial rental rates; except that:

4.4.2. Stockholders (as defined in Section 2 of this rule) of the corporation and any employees of the corporation or membership organization making use of corporate or membership organization real or personal property, facilities and equipment under this Section 4.3 of this Rule must reimburse all costs in excess of those that would arise from "Occasional, Isolated or Incidental" use. As to such occasional, isolated or incidental use, reimbursement will be required only to the extent that the overhead or operating costs of the corporation or membership organization are increased. As used here, "Occasional, Isolated or Incidental Use" generally means:

4.4.2.a. When use by corporate or membership organization employees during working hours, an amount of activity during any particular work period which does not prevent the employee from completing the normal amount of work which that employee usually carries out during such work period; or

4.4.2.b. When used by corporate stockholders other than employees during the working period, such use does not interfere with the corporation in carrying out its normal activities; and/or

4.4.2.c. Any such activity which does not exceed one (1) hour per week or four (4) hours per month, regardless of whether the activity is undertaken during or after normal working hours, shall be considered an occasional, isolated or incidental use.

§146-1-5. Powers And Duties Of Corporate and Membership Organization Political Action Committees.

5.1. All Corporate and membership organization Political Action Committees must file notice of their existence with the appropriate election officer, as required by W. Va. Code § 3-8-5b, prior to meeting the definition of a corporate or membership organization political action committee.

5.2. Solicitation and acceptance of contributions.

5.2.1. A Corporate or membership organization Political Action Committee may solicit contributions and volunteer personal services solely from the restricted group(s) of the corporation(s) or membership organization which established such Corporate or membership organization Political Action Committee.

5.2.2. All solicitations by Corporate or membership organization Political Action Committees shall conform in method and manner to the provisions of W. Va. Code § 3-8-8.

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5.2.3. A Corporate or membership organization Political Action Committee is specifically prohibited from receiving any direct or indirect payment, distribution, discount, loan, advance, deposit, gift of money or any services or anything of value from any person other than the corporation(s) which established such Corporate or membership organization Political Action Committee or the restricted group(s) of such establishing corporation or membership organization.

5.2.4. No Corporate or membership organization Political Action Committee shall hold or sponsor any raffle, dance, banquet or similar fund-raising event directed to persons other than the restricted group(s).

5.3. Contributions and expenditures by Corporate or membership organization Political Action Committees.

5.3.1. No Corporate or membership organization Political Action Committee shall directly or indirectly make any contribution in excess of the limits set forth in 146 CSR 3. For purposes of applying contribution limitations, all Corporate or membership organization Political Action Committees established, maintained or controlled by the same corporation(s) or membership organization(s), including their respective parents, subsidiaries, branches, divisions, departments or local units, are aggregated into one (1) Political Action Committee. This contribution limitation applies separately to contributions made in connection with the primary election for nomination of a candidate, and contributions made in connection with the election which determines the officeholder.

§146-1-6. Miscellaneous Provisions.

6.1. Notwithstanding any provision of these regulations to the contrary, a corporation or membership organization which customarily makes its meeting rooms available to clubs, civic or community organizations, or other groups may make such facilities available to a political committee, if the meeting rooms are made available on a nonpartisan basis and on the same terms given to other groups using the meeting rooms.

6.2. All persons are prohibited from knowingly accepting or receiving any contribution, payment, distribution, loan, advance, deposit, gift of money or services or anything of value prohibited by these regulations.

6.3. Nothing in these regulations limits in any manner the reporting obligations of corporations or membership organizations or Corporate or membership organization Political Action Committees or any other person under W. Va. Code §§ 3-8-5, 3-8-2 and 3-8-2b.

§146-1-7. Penalty Provision.

7.1 Any person violating this rule shall be guilty a misdemeanor, and, upon conviction thereof, shall be fined not more than ten thousand (\$10,000) dollars pursuant to W. Va. Code § 3-8-8.