

# Exercising Our Power: Permissible Advocacy for 501(c)(3)s and 501(c)(4)s

League of Women Voters &  
League of Women Voters Education Fund  
National Council Meeting

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John Pomeranz

Harmon, Curran, Spielberg + Eisenberg, LLP

1725 DeSales Street, NW, Suite 500 • Washington, DC • 20036  
202-328-3500 • [jpomeranz@harmoncurran.com](mailto:jpomeranz@harmoncurran.com)

## Agenda

- Overview: Advocacy by tax-exempt orgs
- Lobbying
  - 501(c)(3) limits
  - Lobbying disclosure laws
- Election-related activities
  - 501(c)(3) limits
  - 501(c)(4) activities



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## Tax Benefits or Advocacy?

	501(c)(3) "Public Charity" <i>(All for public good)</i>	501(c)(4) "Social Welfare Org." <i>(Most for public good)</i>	527 "Political Org." <i>(Most for political work)</i>
<b>Examples</b>	<ul style="list-style-type: none"> <li>• LWVEF</li> <li>• Amer. Red Cross</li> <li>• Sierra Club Found.</li> </ul>	<ul style="list-style-type: none"> <li>• LWV</li> <li>• Sierra Club</li> <li>• Crossroads GPS</li> </ul>	<ul style="list-style-type: none"> <li>• Sierra Club PAC</li> <li>• EMILY's List</li> <li>• American Crossroads</li> </ul>
<b>Tax Benefits</b>	<ul style="list-style-type: none"> <li>• Tax-Exemption</li> <li>• Deductible Contribs</li> <li>• Foundation Grants</li> </ul>	<ul style="list-style-type: none"> <li>• Tax-Exemption</li> </ul>	<ul style="list-style-type: none"> <li>• Tax-Exemption</li> </ul>
<b>Lobbying</b>	Limited	Unlimited	Rare (and usually taxable)
<b>Election-Related Activity</b>	Can't support or oppose candidates. Nonpartisan activities OK	Partisan activity can't be primary activity. May be taxable	Primary purpose is partisan activity

## 501(c)(3) Lobbying Limits: Two Tests

- “No Substantial Part” Test
- 501(h) Expenditure Test



## 501(h) Expenditure Test

- Clear definitions of lobbying
  - Distinguishing grassroots vs. direct lobbying
- Clear dollar-based limits
  - Grassroots limit: 25% of overall limit
- Maximum lobbying: \$1 million (\$250,000 grassroots)



## What is Lobbying?

Direct Lobbying	Grassroots Lobbying
Communication	Communication
Expressing a View	Expressing a View
Specific Legislation	Specific Legislation
Legislator (or other official or staffer involved in legislation)	General Public (Not "members")
	Call to Action

## Key Point: Call to Action

- Urging people to contact their legislator
- Providing contact information for a legislator
- Providing a postcard, petition, web link, or other means to contact a legislator
- Identifying legislators who are:
  - On relevant committee
  - Opposed to legislation
  - Undecided on legislation
  - Representing reader

Generally,  
no call to action, no  
grassroots lobbying

## Lobbying Exceptions:

- Nonpartisan Analysis, Study or Research
  - “Full and fair” discussion of the issue
  - No direct call to action
- Request for Technical Assistance
  - In writing
  - From government body (e.g. committee)
- Self Defense
- Discussion of Broad Issues



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## Ballot Measures

- 501(c)(3)s may urge people to vote for or against ballot measures (initiatives, referenda, etc.)
- Counts against the 501(c)(3)'s lobbying limits
  - Because voters are “legislators,” treat activity as direct, not grassroots, lobbying
- Permits more partisan tactics
  - Messages that focus on a single issue and state a position on that issue
  - Targeting communications to voters likely to vote the way the 501(c)(3) wants
  - Single topic events that don't present both sides of the issue

Warning: State election laws may treat organizations working on ballot measures as “political committees”



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## Lobbying Disclosure

- Under federal, many state, and some local laws, lobbyists or the organizations that employ them) that meet certain minimum thresholds of lobbying activity must register and file reports of their activities
- None of these lobbying disclosure laws restrict the amount of lobbying an organization may do
- Each jurisdiction defines “lobbying” differently and those definitions often differ from the IRS definitions of lobbying for 501(c)(3)s and 501(c)(4)s. For example, the federal Lobbying Disclosure Act and many state lobbying laws treat efforts to influence administrative agency decisions as lobbying
- Not all lobbying need be reported. E.g. LDA only tracks federal lobbying



## Basic Rule for 501(c)(3)s

May not “participate in or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office”

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May not support or oppose a candidate for public office

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No “electioneering”



## Basic Rule for 501(c)(4)s

Primary purpose must be “social welfare” activity, which does not include “exempt function” as defined under IRC section 527(e)

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Primary purpose may not be electioneering

**527(f) Tax:** 501(c)s are liable for tax on the *lesser* of:

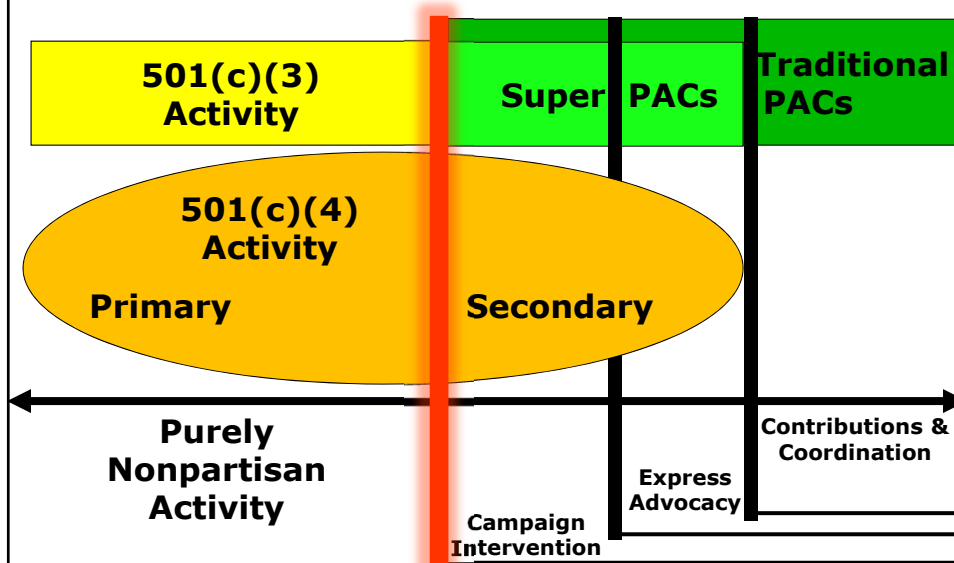
- Political expenditures, or
- Investment income

(If owed, file Form 1120-POL)



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## Political Activity Spectrum



## The IRS will evaluate based on all the “Facts and Circumstances”

### Good Facts

- No reference to candidate or elections
- External factor driving timing
- Broad range of issues
- History of similar work on issue

### Bad Facts

- Reference to candidate
- Timing motivated by election
- Politically motivated targeting
- Compare preferred position to candidate position
- “Wedge issues”



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## Case Study: Use of Social Media

**Situation:** To what degree can you talk politics on Facebook, Twitter, and other social media?

**Issues:**

- Personal social media account or official organization account?
  - All accounts branded with organization name or logo are official
  - Personal accounts are more likely to be treated as official accounts is frequently or predominantly used to promote the organization’s message, or if the employee is required to so use the account
- Using official 501(c)(3) accounts, post no prohibited messages
  - Arguably permissible to let others post political messages on official Facebook page, etc., if not censored based on viewpoint.
- Using personal accounts, politics are permissible, but take necessary steps to avoid attribution to organization
  - High-profile employees should consider disclaimer on personal accounts



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## Federal Election Law

- Cash or in-kind contributions to candidates from corporations (even nonprofits) is prohibited
  - Coordinating activities with a candidate is an in-kind contribution
- However, previous restrictions on ***independent*** expenditures supporting or opposing candidates are now gone. *Citizens United v. FEC*, 558 U.S. 310 (2010)
- Results:
  - Independent Expenditure PACs (aka “Super PACs”)
  - Increased political use of 501(c)(4)s (and other 501(c)s)



## State Election Laws vs. FECA

- States (and some local jurisdictions) have their own laws governing elections for state and local office
- Sometimes activities that are illegal for corporations to do regarding federal candidates are legal for state candidates
  - E.g. Virginia law permits corporate contributions to state and local candidates
- State laws typically regulate ballot measure activity as election-related activity



## 501(c)(4) Electoral Activities

- 501(c)(4)s may engage in 501(c)(3)-prohibited political efforts that support or oppose candidates
  - 501(c)(4) political work can't be “primary purpose”
- 501(c)(4)s must comply with campaign finance law
  - Federal and some state laws prohibit cash or in-kind contributions to candidate, parties, and some political committees, including “coordinated” efforts
  - Likely reporting and disclaimer requirements for communications that expressly advocate for or against a candidate or sometimes even just identify a candidate close to an election
- Must keep 501(c)(3)s separate to protect 501(c)(3)s



## LWVUS Nonpartisan Policy

- Where does the LWVUS policy of nonpartisanship fit on this spectrum?
- IRS “campaign intervention” standard? Arguably more restrictive than LWVUS (e.g., criticism of candidate policies or statements close to election)
- FEC “express advocacy” or “contribution” standards? LWVUS likely covers that and more



## What Would You Do? The Empty Chair Debate

Both of the candidates running for mayor agree to participate in your September 10 debate, but on September 4, one candidate informs you that she won't be able to participate after all.

- May a 501(c)(3) hold the debate with the remaining candidate?
- May a 501(c)(4)?
- What do you say or do about the missing candidate?

Warning: Some old FEC guidance suggests that you can't hold an empty chair debate in a federal race

## What Would You Do? Late Arising Barriers to Voting

One month before the November 2020 election, a governor seeking reelection in a closely fought race announces that several polling places in largely African American precincts will be moved or have fewer voting machines, claiming that the locations are no longer available or appropriate and that other precincts need more of the limited supply of voting machines. The opposing party notes that the governor has historically done poorly among African American voters and claim that this is a blatantly political move to suppress the African American vote.

- May a 501(c)(3) League criticize the governor?
- May a 501(c)(4)?
- Does the statement merely decry the changes as limiting the ability of people to vote or does it allege a political motivation?