

NON-PROFIT & NON-PARTISAN TRAINING FOR LEAGUES IN CHALLENGING TIMES

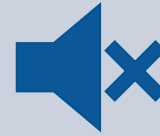
WITH JIM JOSEPH, Partner, Arnold & Porter

Presented by LWV Litigation

Housekeeping



This training will be recorded, and slides will be shared.



If you are not speaking, please mute yourself to minimize sound issues.



Make sure you identify yourself (name, League, State &, if you'd like, pronouns) when asking questions



Staff will be monitoring the Q&A box and chat. If you have any questions for the speaker, please feel free to drop them in the Q&A box.

Community Norms

Bring your full self and limit distractions.

What is learned here, leaves here.

No one knows everything, but together we know a lot.

Don't yuck my yum.

Oops, ouch, and educate.

Assume best intentions.

Presenters



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League of Women Voters Training: 501(c)(3)s and 501(c)(4)s

James P. Joseph

July 11, 2025

This summary is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

Agenda

- 501(c)(3)s and 501(c)(4) organizations
 - Purposes
 - Requirements
 - Restrictions on lobbying and political activity/electioneering
- Special considerations for affiliated tax-exempt organizations and best practices
- Q&A

The Basics:

**501(c)(3)s
and
501(c)(4)s**

The Basics: 501(c)(3)s

- Basic criteria for exemption under section 501(c)(3) include:
 - Organization is organized and operated “exclusively” for charitable purposes (“exclusively” actually means primarily)
 - No part of its net earnings inure to the benefit of any shareholder or private individual
 - Does not conduct more than an “insubstantial” amount of lobbying activity
 - Does not engage in any political/electioneering activities
 - Does not have a purpose of or engage in any activities that violate public policy
- Both public charities and private foundations are 501(c)(3)s.

The Basics: 501(c)(4)s

- **Formation and purposes**

- Primary purpose is “the promotion of social welfare” – a broad (and somewhat vague) concept that includes charitable activities and other public benefit type activities
- 501(c)(4)s:
 - Are usually organized as a nonprofit or nonstock corporation under state law (not organized for profit, no shareholders or financial owners)
 - Must notify the IRS of their formation within 60 days of formation (Form 8976)
 - Can (but are not required to) file a (public) exemption application with the IRS (Form 1024-A)
 - Are not subject to a public support test like 501(c)(3) public charities, so can be funded by one individual or a small group of donors

- **Operational requirements**

- In contrast to 501(c)(3)s, 501(c)(4)s can engage in an *unlimited* amount of lobbying activity and a *limited* amount (not primary purpose) of political campaign activity

- **Disclosure requirements**

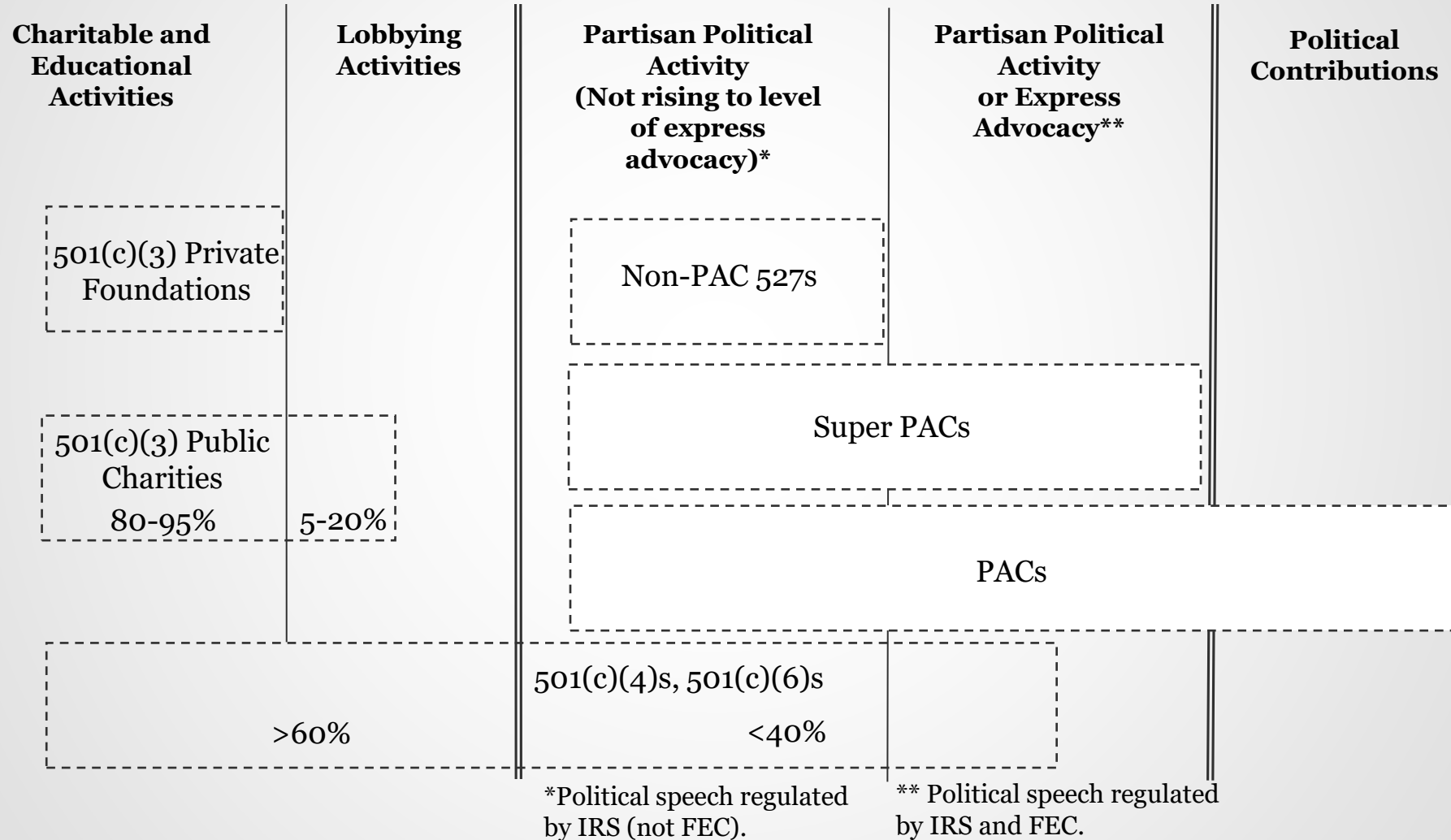
- 501(c)(4)s have to file and make public annual tax information return with the IRS (Form 990).
- Donors to 501(c)(4)s are generally not disclosed on the Form 990, but may be requested by the IRS, or may be disclosed at the state level primarily in connection with certain lobbying or political activities.

Types of Tax-Exempt Organizations

	501(c)(3) Private Foundation	501(c)(3) Public Charity	501(c)(4) Social Welfare Org	527 Political Org
Purpose	<ul style="list-style-type: none"> Charity, education, religion or science Contributions from limited sources 	<ul style="list-style-type: none"> Charity, education, religion or science 	<ul style="list-style-type: none"> Social welfare or advocacy (lobbying) 	<ul style="list-style-type: none"> Political
Examples	<ul style="list-style-type: none"> Gates Foundation Ford Foundation 	<ul style="list-style-type: none"> Sierra Club Foundation American Red Cross Heritage Foundation 	<ul style="list-style-type: none"> Sierra Club National Rifle Association Crossroads GPS 	<ul style="list-style-type: none"> Sierra Club Political Committee EMILY's LIST American Crossroads
Tax Benefits	<ul style="list-style-type: none"> Tax exemption Contributions deductible Gift tax deduction 	<ul style="list-style-type: none"> Tax exemption Contributions deductible Gift tax deduction 	<ul style="list-style-type: none"> Tax exemption Gift tax exemption 	<ul style="list-style-type: none"> Tax exemption Gift tax exemption
Lobbying	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> Limited 	<ul style="list-style-type: none"> Unlimited 	<ul style="list-style-type: none"> Rare (and usually taxable)
Election-Related Activity	<ul style="list-style-type: none"> Can't support or oppose candidates Nonpartisan activities OK 	<ul style="list-style-type: none"> Can't support or oppose candidates Nonpartisan activities OK 	<ul style="list-style-type: none"> Partisan activity cannot be primary activity May be taxable 	<ul style="list-style-type: none"> Primary purpose is partisan activity

Note: 501(c)(4)s and 501(c)(6)s have the same rules for these purposes.

IRS Educational, Lobbying and Political Activity Spectrum



Lobbying and Political Activity/ Electioneering

Lobbying

- Lobbying is advocating the adoption, rejection or introduction of “specific legislation” in a “legislative body” – this includes legislation at the federal, state and local level in the US and in foreign countries
 - Lobbying generally does not include advocacy directed towards administrative or executive agencies, agency rulemaking, etc.
 - Two types of lobbying:
 - *Direct lobbying*: communication (i) with legislators, legislative staff or any governmental employee who may participate in the formulation of legislation, (ii) which refers to specific legislation, and (iii) reflects a view on that legislation
 - *Grassroots lobbying*: communication (i) to the general public, (ii) which refers to specific legislation, (iii) which reflects a view on that legislation, and (iv) includes a “call to action” – encourages members of the public to contact their legislative representatives (e.g., states “contact your Senator,” provides a legislator’s contact information, etc.)
 - Exceptions to lobbying include (i) nonpartisan analysis, study or research and (ii) requests for technical advice from a governmental body
- Federal lobbying activities may trigger registration under Lobbying Disclosure Act (LDA) – but LDA does not limit the amount of lobbying
 - Note: state and local lobbying activities may trigger registration under state and local law

501(c)(3)s and 501(c)(4)s: Lobbying vs. Policy Advocacy

• Lobbying

– (c)(3) public charities:

- Public charities may engage in a limited amount of “lobbying” (as defined by IRS).
 - How much lobbying is too much for a public charity?
 - Facts and circumstances analysis (5% of time/expenditures considered safe) OR
 - Measured according to the “501(h)” test: dollar limit for lobbying expenditures based on the (c)(3)’s budget – separate sub-limits for “grassroots lobbying” and “direct lobbying”

– (c)(3) private foundations:

- Private foundations are prohibited from engaging in or funding lobbying (including earmarking grant funds for lobbying).

– (c)(4)s:

- (c)(4)s can engage in an *unlimited* amount of lobbying activity.

• Policy Advocacy

- Both (c)(3)s and (c)(4)s can engage in policy education and advocacy (educating policy makers and the general public about policy issues without trying to shape specific legislation)

Political Activity and Electioneering

Basic definition

- Any “participat[ion] or interven[ion]...in any political campaign on behalf of (or in opposition to) any candidate for public office” is considered electioneering or political activity
 - However, no clear statutory or regulatory definition given
 - Applies to US and non-US elections
 - Determined instead under a facts and circumstances test
 - IRS has provided examples of what is or is not political, as well as factors it will consider
 - IRS guidance in **Revenue Rulings 2004-6 and 2007-41**

Basic inquiry

- Is the organization signaling, through the content or delivery of its communications or activities, that it favors or disfavors any candidate or political party?

501(c)(3)s and 501(c)(4)s: Political Activity and Electioneering

- All (c)(3)s are prohibited from engaging in partisan political intervention.
- (c)(4)s can engage in a *limited* amount (not primary purpose) of political activity.
 - Generally considered somewhere between 40-49% of annual activities.
 - May not include cash or in-kind contributions to candidates or coordinating activities with a candidate or political party.
 - May make independent expenditures (content that is not coordinated with a candidate or party, but that clearly supports or opposes a candidate)
- To preserve its reputation as nonpartisan, LWV (at the national, state and local levels) do not endorse candidates or engage in independent expenditures to support or oppose any candidate

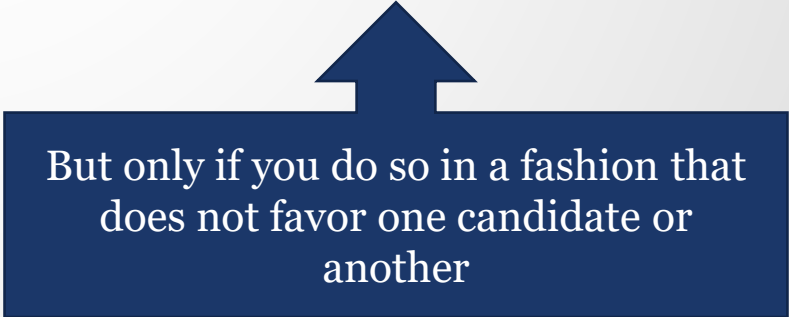
Partisan Political Activity and Electioneering (cont'd)

Political Activity and Electioneering

- Expressly support or oppose candidates
- Endorse candidates
- Contribute to candidates
- Rate or score candidates on the issues
- Compare organization's position to candidate's
- Obtaining and publicizing pledges from candidates
- Provide other assistance to candidates (in-kind contributions)
- Support other organizations' political activity

NOT Political Activity and Electioneering

- Register voters
- Educate voters about candidates/issues
- Take positions on issues
- Legislative scorecards
- Educate candidates
- Get out the vote



But only if you do so in a fashion that
does not favor one candidate or
another

Political Activity and Electioneering (cont'd)

IRS “Facts and Circumstances” Analysis

Good Facts

- No reference to candidate or elections
- External factor driving timing
- Broad range of issues
- History of similar work on issue
- Ongoing communication about central issue of organization
- Educational content (and tone)

Bad Facts

- Reference to candidate (as candidate)
- Timing motivated by election
- Politically motivated targeting
- Compare preferred candidate to candidate position
- “Wedge issues”
- Targeting particular voters

Election Related Activity: Voter Registration and GOTV

- **Voter registration or GOTV efforts are partisan political activity if they favor (or disfavor) a candidate or political party**
 - No “issue screens” or targeting voters based on partisan criteria
 - (c)(3)s must seek to encourage people, in a nonpartisan manner, to exercise their right to vote (i.e., without regard to electoral outcome)
- **Guidelines for nonpartisan voter guides**
 - Location and audience based on nonpartisan criteria (e.g., historical disenfranchisement)
 - Discuss broad range of issues (or no issues)
 - Don’t suggest a “correct” position
 - Don’t connect with organization’s advocacy activities



Private foundation caution: Section 4945(f) generally prohibits foundations from earmarking grants for voter registration *unless* grantee meets certain criteria

State/local law caution: Increasing regulation of voter registration activities – restrictions may apply *even* where permissible under IRS rules

Election-Related Activity: Candidate Appearances and Forums/Debates

- **Candidate forums and debates:** Events that host all or most candidates, and are balanced/fair to all candidates unlikely to be partisan political activity for tax purposes
 - Nature of questions asked
 - Equal opportunity to answer
 - Audience composition
- **Candidate appearance as candidate**
 - Invitations to all candidates (concerns if only one candidate or candidates from one party accept/s)
 - No favoritism – timing, setting, questions/interaction with candidates
- **Candidate appearance in *non-candidate* capacity**
 - Equal opportunity not required
 - Clear context/justification for participation in non-candidate role
 - No campaign activity for fundraising



Federal and some state campaign finance laws also have rules governing candidate debates, as does the FCC if the debates are broadcast.

Election-Related Activity: Candidate Education/Policy Engagement

(c)(3)s can educate candidates on policy/issues, but cannot provide cash or in-kind support to candidates or parties

Permitted

- Resources available to all candidates on the same terms
 - Publicly available
 - Fair market value (or free if generally made available for free)
 - Offer at the same time to all candidates -- not just in response to request, no requirement that all accept offer



If candidate is a legislator or government official, “candidate” education may still be lobbying

Not Permitted

- In-kind support to candidates
 - Facilities (office space, meeting rooms)
 - Staff time (paying staff to do work for campaigns)
 - Intangible resources (donor lists, polling data)
 - “Consulting” services

501(c)(4) not prohibited by tax law from making in-kind contributions, but campaign finance restrictions apply

The Rules of the Road

Here is an analytical framework for determining if something is electioneering or a partisan political activity:

- Who:
 - ✓ Who are you talking about (an officeholder, candidate, other)?
- What:
 - ✓ What are you saying?
 - ✓ Are you discussing an inherently partisan/wedge issue?
 - ✓ Are you indicating in content or tone that you are favoring one candidate for elective office or not?
- Where:
 - ✓ Who is the intended audience?
 - ✓ Is there a partisan political reason for targeting that audience?

The Rules of the Road (cont'd)

- When:
 - ✓ When are you discussing these issues (close in time to an election)?
 - ✓ Is the election the reason you are saying this now or are there other reasons?
- Why:
 - ✓ Why do you have to say these things, in this way, to this audience, at this time?
 - ✓and be honest.
- If engaging in issue advocacy/education during an electoral season, another test is: would a [fill in the blank with the political opposite of you] read this content and say “yes, that is why I am voting for [the candidate you don’t support].”
- Always know your client’s risk tolerance?
 - Go right up to the line?
 - Take a giant step back from the line?

Special Considerations for Affiliated Tax- Exempt Organizations

Affiliated 501(c)3/501(c)4 Organizations

- **Common to share governance, mission, activities**

- Overlapping Boards of Directors
- Shared or complementary tax-exempt mission
- Shared space, staff and other assets
- Complementary programmatic activities or grantmaking
- Unified branding



What does it mean to be “affiliated” anyways?

The Conundrum: Tax Law v. Organizational Effectiveness

- **Must maintain (c)(3)/(c)(4) separation** : the (c)(3) cannot subsidize or support the (c)(4)'s non-(c)(3)- appropriate activities
 - (c)(3)s cannot indirectly engage in political activities thru an affiliated (c)(4)
 - Both the (c)(3) and the (c)(4) must follow legal limits on lobbying/political activities
 - The (c)(4) is permitted to pay for/support any of the (c)(3)'s activities
 - **BUT many affiliated (c)(3)/(c)(4) orgs want “one face” or a single brand** to maximize programmatic impact, raise public awareness or cultivate donor – but lack of clarity of separateness may cause impermissible (c)(4) activities to be attributed to the (c)(3) even when the (c)(3) does not fund those activities.

Role of Public Perception in Affiliated Org Structures

- **Public perception of organizational separation may be as important as reality:** careful thought to how it is communicated both internally and externally, for example:
 - Shared employees must be clear about which “hat” they are wearing during specific activities (both internally and with third parties)
 - Public messaging of separation, based on risk tolerance (different email addresses, clear signature blocks, no comingling of activities, etc.)
- **Implications of perceived lack of separation:** public view that the (c)(3) is engaging in or subsidizing impermissible political activities may prompt public scrutiny, complaints to the IRS and other regulators regarding appropriate use of taxpayer-subsidized funding. This could:
 - Lead to IRS/state AG inquiry or audit
 - Attract Congressional or state legislative attention
 - Result in negative press that damages reputation and trust of donors, grantees, partner orgs
 - Distracts from the important work of the organizing (cost, effort of dealing with the above)

Considerations – Corporate Governance

- **Board separation:** board overlap common, but generally boards should not be identical
 - Majority v. minority overlap
 - Consider tax/disclosure implications
- **Conduct of board meetings**
 - Separate meetings, even if sacrificing efficiency
 - Limited opportunity for “joint” meetings
 - Meetings documented in separate minutes
- **Separate corporate documents** (*e.g.*, bylaws, resolutions, policies, procedures)
- **Separate authorization of strategy, budget and activities** (at both board and management level)



Principles apply even where it would be more efficient or effective to combine governance activities

Considerations – Resource Sharing/Cost Allocation

- **Employees:** allocation of employee costs, so that (c)(3) does not pay for employee time spent on (c)(4) activities (both programmatic and administrative)
- **Use of assets:** reasonable allocation of use of facilities, equipment, etc. (e.g., based on staff time, programmatic/grant expenditures, etc.)
- **Intellectual property:** consider whether the (c)(3) or the (c)(4) should own the trademark, how license should be structured
- **Websites:** reasonable allocation of any shared website(s) (e.g., based on space used, who funded design or content creation, etc.)
- **Vendor services:** consider how to structure contracts, payments for shared vendors (e.g., separate agreements with and direct payment of vendors?)

Considerations – Resource Sharing/Cost Allocation (cont'd)

- **List ownership and use:**
 - If (c)(3) owns a list, the (c)(4) must pay at least market rate (benchmarked) for its use (rent payments for each use, or purchase price for ownership)
 - (c)(4) may share its lists with the (c)(3) at no cost; (c)(3) cannot pay more than market rate
- **Timing of payments:** consider frequency of payments, how to ensure no (c)(3) subsidy of (c)(4) activity (e.g., periodic “true up”, reimbursement after expenditure v. advancement of funds, etc.)
- **Periodic evaluation of cost sharing agreement:** review legal terms and how payments are calculated to ensure the agreement reflects changes in activities, staffing, cost structure, etc.

Considerations – Staffing

- **Staffing design:** consider administrative burden of shared staffing model
 - Consider designating different staff for (c)(3) and (c)(4) programs where possible
 - For shared staff, must track or allocate time on (c)(3) and/or (c)(4) programs and operations
 - Consider time entry v. alternative methodologies (for example, calculating administrative staff time using a formula keyed off programmatic staff time to cover, etc.)
- **Time records:** may be necessary to track certain staff time supporting lobbying or political activities to comply with both tax and non-tax legal requirements
 - Lobbying: ensure (c)(3) public charity is within IRS limits; both (c)(3) public charity and (c)(4) comply with registration/reporting under LDA or state equivalents
 - Political activity: ensure that (c)(4) is within IRS limits; complies with any campaign finance registration/reporting to FEC or state equivalents
- **Sharing of materials, data, planning, grantees, etc.**
 - Watch out – (c)(3)'s activities must not be used in service of impermissible (c)(4) goals or strategies; separate strategy documents and plans for executing on the strategy
 - Consider firewall to prevent sharing of certain information

Critical to educate!



Considerations – Fundraising Activities

- **No subsidization of (c)(4) fundraising by (c)(3):** additional risk to (c)(3) due to the advocacy/political content of a typical (c)(4) “ask” – it is safest to keep solicitations separate
 - If a (c)(3) solicitation links to or otherwise mentions the (c)(4) organization, it must properly allocate a percentage of costs to the (c)(4) (*e.g.*, based on space, etc.)
 - Caution must be taken if a joint (c)(3)/(c)(4) solicitation is made! In addition to allocating costs, make sure that the activities of the organizations are clearly delineated – and that there is no suggestion that the (c)(3)’s activities are improperly supporting any (c)(4) political activities
- **Fundraising registration:** always verify that state fundraising registrations have been obtained (~40 states require registration for charitable solicitations – may include (c)(4) organizations)
- **Deductibility of contributions:** any solicitation regarding the (c)(4) must specify that contributions are not tax deductible

Considerations – Coalition/Partnership Activities

- **General rule:** a tax-exempt organization cannot engage in coalition activities that it could not undertake directly or indirectly with grants or other support
- **Risks of coalition activity:**
 - Partisan political activities of a coalition, or individual members, may be attributed to the (c)(3) even where a coalition member has not participated in, endorsed or provided funds or other support to the relevant activity
 - Lack of coalition or public clarity about whether a shared (c)(3)/(c)(4) staff member is participating in a (c)(3) or (c)(4) capacity – or whether the (c)(3)'s programs are being operated for the benefit of (c)(4) political activity
 - Perception that a funder is earmarking or directing grantees to engage in political activities



Importance of public and coalition partner perception

Considerations – Coalition/Partnership Activities (cont'd)

- **Protective measures**

- Control overuse of funds or resources – segregate contributions from coalition members that may not be used for lobbying or partisan political activities
- Plan meeting agenda and timing – if meetings will involve members with different tax statuses, distribute agenda in advance/adhere to agenda and enable members to leave when meeting content is inappropriate
- Control over branding – coalition members should enter into an agreement regarding use of any separate coalition name, as well as the names of members (*e.g.*, only use (c)(3)'s logo with (c)(3)'s specific approval)
- Control overuse of coalition website – agreement regarding structure of website, what content may be displayed

- **Considerations for coalition participation by affiliated orgs**

- Ensure staff are clear about and track which activities are funded by which of the (c)(3)/(c)(4) affiliated organizations – *e.g.*, precise use of organizations' names
- Do not create content funded by the (c)(3) for use by the (c)(4) to engage in partisan political activity; *e.g.*, do not use (c)(3) funds to pay for a nonpartisan public opinion survey that will be augmented with additional content for a partisan purpose

Considerations – Branding and Websites

- **Clear (c)(3) v. (c)(4) branding:** (c)(3) materials should have **different look and feel** from (c)(4) materials (emails, newsletters, websites, etc.)
- **Consider use/risk of links:** Content on a linked-to page is attributed to the initiating page – so, if (c)(3) links to a (c)(4) page containing lobbying or political speech, (c)(3) will be treated as having engaged in that speech
- **Minimize risk by:**
 - Different look/feel of (c)(3)/(c)(4) content, websites – user should not be confused as to whether they are on the (c)(3) or (c)(4) site (even if this is desirable from a branding perspective)
 - When linking from the (c)(3) to (c)(4) site/content, lobbying and/or political speech should generally be at least “two clicks” away (this may include a “flash” page) – however, for now, may link from the (c)(3) to the (c)(4) home page (under IRS temporary guidance) Recommendation: Do not feature (c)(3) impermissible content on the (c)(4) homepage.
 - Maintain separate websites – and many related organizations make it easy to navigate from the (c)(4) to the (c)(3), but difficult/impossible to navigate from the (c)(3) to the (c)(4)
 - Remember that shared website expenses must be properly allocated between organizations (*e.g.*, site development and design, technology used, space, content, etc.)

Evaluating and Mitigating Affiliated Entity Risk

- Look across multi-entity affiliated organizations for “big-picture” risk, including risk based on public perception
- Mitigate risk by leveraging different entities in affiliated organizations for different uses
 - Understand the benefits/limitations of each entity type
 - Develop coherent policy on organizational use
- When developing and implementing strategy, weigh the trade-offs of:
 - Programmatic effectiveness
 - Administrative efficiency
 - Risk appetite

Questions?

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