



# Nonprofits and Elections in 2020

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## **Janice M. Ryan**

Partner, Venable LLP | +1 202.365.4085 | [jmryan@Venable.com](mailto:jmryan@Venable.com)

## **Margaret C. Rohlfing**

Co-Chief Corporate Counsel, ACLU | +1 212.519.7865 | [mrohlfing@aclu.org](mailto:mrohlfing@aclu.org)

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# Today's Agenda

- Nonprofit Election Activity Fundamentals
  - Federal tax law
  - Campaign finance law (federal, state, local)
- 501(c)(4)/501(c)(6) Election Activities
  - Contributions and independent expenditures
  - PACs
- 501(c)(3) Election Activities
  - Nonpartisan voter engagement
  - Issue advocacy
- Using Affiliated Entities

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# Nonprofit Election Activity Fundamentals

Tax and Campaign Finance 101

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# Legal Framework

- **Federal tax law**

- Governs the extent to which tax-exempt organizations may engage in activities to support or oppose candidates without jeopardizing the organization's tax-exempt status and whether any such activity requires public disclosure or payment of tax

- **Campaign finance law**

- Typically places limits on contributions to candidates and political committees and requires public disclosure of amounts contributed or expended in support of or in opposition to candidates and political committees
- Intended to prevent corruption of public officials and promote transparency in elections



# Federal Tax Law Basics

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# Limits on Political Campaign Intervention

## 501(c)(3): Public Charity

### Campaign intervention **prohibited**

- No endorsements
- No contributions
- No communications to support or oppose candidates

## 501(c)(4): Social Welfare

## 501(c)(6): Trade Association

### Campaign intervention **limited**

- May not be primary activity
- May contribute to candidates (if allowed under state law)
- May form a PAC
- May endorse candidates
- May make communications to support or oppose candidates

# What Is Political Campaign Intervention?

- Basic concept—**participation or intervention** in a **political campaign** on behalf of or in opposition to a candidate at the **local, state, or federal** level
  - For example, publication or distribution of written statements or the making of oral statements on behalf of or in opposition to a candidate
  - Intervention can be direct or indirect
- The IRS uses a facts and circumstances test
  - Alleged intervention will be evaluated in context
  - Specific references to candidates may be considered, as well as scope of content, format, audience, subtext, and other subjective factors
  - IRS Revenue Ruling 2007-41

# Campaign Intervention or Issue Advocacy?

- Identification of one or more candidates for a given public office
  - Reference to a candidate's name or a specific upcoming election is suggestive of political campaign intervention, but not determinative
  - Pictures, party affiliation, and other distinctive features of a candidate can support conclusion that activity is political campaign intervention
- Expression of approval or disapproval for one or more candidates' positions or actions
- Temporal proximity to the election
- Reference to voting or an election



# Campaign Intervention or Issue Advocacy cont'd

- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office, such that support of an issue implies support of the candidate
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office

# Ballot Measure Advocacy

- **Lobbying for Tax Purposes:** Advocacy for or against a ballot measure or referendum is considered lobbying for tax purposes, not political campaign intervention
  - Permissible for 501(c)(3)s
- **Political for Campaign Finance Purposes:** But supporting or opposing ballot measures is regulated under state or local campaign finance laws:
  - Spending money on ballot issue campaigns may trigger ballot committee status or may require reporting
  - Donor disclosure may become an issue and is a growing area of regulation
  - Disclaimers on communications – even social media or emails – may be required
  - Failure to review state/local laws related to raising funds to support or oppose ballot initiatives can be major trap for the unwary
    - Raising any money at all to support or oppose is often a trigger for becoming a ballot committee
    - Severe financial penalties and public perception consequences

# IRC 527—Political Organization Tax Exemption

- What is a 527 organization?
  - Tax-exempt organization created primarily to influence the selection, nomination, election, appointment, or defeat of candidates for federal, state, or local public office
  - Examples: A federal or state political action committee (PAC), a federal or state independent expenditure-only committee, a candidate committee
  - NOT a ballot initiative or measure committee (lobbying)
- Often created as an affiliate of a 501(c)(4) or 501(c)(6) organization
- 501(c)(3) organizations **cannot** contribute to or be affiliated with 527 organizations
- Tax filings
  - Form 8871 upon creation (unless federal PAC)
  - Regular filing of Forms 8872 (unless federal or state/local PAC)
  - Form 990 series (unless federal PAC)
  - Form 1120-POL



# Campaign Finance Law Basics

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# Campaign Finance Law Framework

- **Contribution Limits:** Contributions are generally subject to limits
- **Political Committee Registration:** Entities that make a certain amount of contributions or expenditures may be required to register as political committees and disclose all contributions and expenditures (note “major purpose” test)
- **Political Reporting:** Even if not a political committee, contributions or expenditures may need to be disclosed
  - **Donor Disclosure:** Whether or not an entity is a political committee, donors may be disclosed if making expenditures for regulated communications (e.g., independent expenditures or electioneering communications)
- **Political Disclaimers:** Expenditures for political communications may trigger disclaimer requirements (“Paid for by...” “Not authorized by any candidate or candidate committee”)

# Contributions versus Expenditures

## Contributions

- Monetary support given directly to a candidate, PAC, or party
- In-kind support (discounts, etc.) given directly to candidate, PAC, or party
- In-kind activity for the benefit of a candidate, PAC, or party done at the request or suggestion of the candidate, PAC, or party

## Expenditures

- Spending money to support candidates, PACs, or parties, done without coordinating
- If coordinated, becomes a contribution

# Contribution Limits

## Corporations

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- Federal: may not give
- State: laws vary

## Foreign Nationals

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- Prohibited at federal, state, and local level
- May not control political activities

## Gov't Contractors

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- Federal: banned (but applies mostly to individuals)
- State: restricted by many state and local laws

## Reimbursements

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- Prohibited at federal, state, and local level
- Earmarking through other entities often restricted

# Contributions—Examples

- The following activities, if performed for a candidate or political committee for free, are considered something of value (e.g., the cost of staff or vendor time to do the work) and are treated as prohibited in-kind contributions:
  - Conducting research
  - Writing speeches or white papers, or preparing talking points
  - Sharing polling information and other non-public data
  - Sharing email lists or other valuable intellectual property
  - Hosting campaign events
  - Soliciting contributions
  - Providing other services or materials to a federal candidate or political committee
- If candidate pays fair market value for goods, services, or other materials, no contribution results (but might give rise to campaign intervention for 501(c)(3)s)



# Independent Expenditures

- Expenditures for communications that **expressly advocate** the election or defeat of a clearly identified candidate and that are **not coordinated** with a candidate, political party, or their agents
- Express advocacy
  - “magic words” and functional equivalent
  - “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject”

# Independent Expenditures cont'd

- **No limits** on
  - amount individuals or groups (including corporations) may spend independently to support or oppose candidates or parties (*Citizens United*)
  - amount individuals or groups may contribute to independent expenditure-only political committees (i.e., Super PACs)
- Require disclaimers (“Paid for by” “not authorized by any candidate or candidate’s committee”)

## Types of IE Activities

- TV, radio, print, digital ads
- Phone banks
- Direct mail
- GOTV and voter registration drives

# Federal Internet Communications Exemption

- Anything on the internet NOT placed for a fee on a third party's website:
  - Email
  - Blogs
  - Websites
  - Social media
- What is NOT exempt:
  - Banner ads
  - Targeted advertising
  - Paid social media

**BUT NOTE:** Any expenditure for re-publication of candidate materials is an in-kind contribution

# Coordination = Contribution!

Request/Suggestion	Material Involvement	Substantial Discussion	Common Vendor	Former Employee	Re-publication
<ul style="list-style-type: none"><li>• Candidate asks</li><li>• Candidate assents to suggestion</li></ul>	<ul style="list-style-type: none"><li>• Non-public information shared</li><li>• Content</li><li>• Audience</li><li>• Means or mode</li><li>• Outlets</li><li>• Timing/frequency</li><li>• Size, prominence, duration</li></ul>	<ul style="list-style-type: none"><li>• Non-public material information</li><li>• Plans</li><li>• Projects</li><li>• Activities</li><li>• Needs</li></ul>	<ul style="list-style-type: none"><li>• Same vendor within 120 days uses material nonpublic information<ul style="list-style-type: none"><li>• Media strategy</li><li>• Audience selection</li><li>• Polling</li><li>• Fundraising</li><li>• Content development</li><li>• Production</li><li>• Voter list development</li><li>• Consulting or media advice</li></ul></li><li>• May establish a firewall</li></ul>	<ul style="list-style-type: none"><li>• Employee or vendor worked for both entities within 120 days</li><li>• Uses material, non-public information</li></ul>	<ul style="list-style-type: none"><li>• Re-publish or broadcast candidate's materials</li><li>• May use small sections to create ads</li></ul>

## Who Can Make IEs?

- Individuals
- Business entities
- Nonprofit entities, including 501(c)(4) and 501(c)(6) organizations
  - NOT 501(c)(3)s, because of tax code ban on political campaign intervention
- Super PACs

# Federal IE Reporting (Non-political committee)

## Periodic Reports Quarterly

- Required of all entities that make more than \$250 in IEs for any election in a calendar year
- Disclose all payments for the IEs (name and mailing address, amount, date, purpose, whether supporting or opposing a candidate)
- Disclose contributions >\$200

## 48-Hour Reports 20 days or more before election

- Required if spending more than \$10,000 for a given election
- Additional reports required for each additional \$10,000 spent
- Same information as periodic reports

## 24-Hour Reports Between 24 hours and 19 days before election

- Required if spending more than \$1,000 between 19 days and 24 hours before election
- Additional reports required for each additional \$1,000 spent
- Same information as periodic reports

# Federal IEs and Donor Disclosure

- Nonprofits are using super PACs for IEs instead of making IEs directly, because of uncertainty stemming from litigation over FEC rules requiring donor disclosure on non-political committee IE reports (FEC Form 5)
  - Previously: Nonprofits that pay for IEs required to disclose donors who gave more than \$200 to the organization in the calendar year for the purpose of funding the particular ad that is being reported
  - Currently: Federal district court struck down the FEC rule in 2018; currently IE reports filed by groups that are not registered political committees must identify all donors who (1) give to the organization for the purpose of influencing a federal election, or (2) give for the purpose of funding the group's independent expenditures, whether tied to a specific ad or not
  - Litigation is ongoing, currently on appeal before D.C. Circuit



# Electioneering Communications

- An electioneering communication:
  - Broadcast/radio/cable
  - Refers to clearly identified candidate
  - 30 days before primary or 60 days before general
  - Targeted to relevant electorate
- Require FEC disclaimers (e.g., “Paid for by, not authorized by”)
- May not be coordinated with candidates
- 24-hour reporting: ECs aggregating over \$10,000 in the calendar year must be reported to the FEC on Form 9 within 24 hours
  - Disclose donors of \$1,000 or more who gave for the purpose of furthering ECs
- Possible for 501(c)(3)s to make ECs (express advocacy not required!)

# Political Committees

- If a nonprofit must register as a political committee, it may be required to file political committee reports disclosing all receipts and disbursements to the organization
- **Federal:** Any group of persons that:
  - Receives contributions totaling more than \$1,000/year *or* makes expenditures totaling more than \$1,000; *and*
  - Has the “**major purpose**” of influencing federal elections
    - *Buckley:* An organization can be deemed a “political committee” (and thereby become subject to enhanced reporting requirements) only if it:
      - Is under the control of a candidate; or
      - Has the major purpose of nominating or electing a candidate
- **States:** Definitions vary widely
  - Dollar thresholds vary
  - Not all jurisdictions observe major purpose requirement (but has been imposed judicially in certain circuits)

# Political Committee Types

- **Political Action Committees (PACs)**

- May only accept contributions that comply with contribution limits
- May make contributions to candidates, subject to limits
- Includes several varieties:
  - Connected PAC (also known as a separate segregated fund or SSF): PAC established by a corporation to collect contributions from its members or employees
  - Nonconnected PAC: PAC not established by a corporation

- **Independent Expenditure-Only Political Committees (Super PACs)**

- May accept unlimited contributions from individuals and corporations
- May *not* make contributions to candidates; may only make IEs not coordinated with any candidate

- **Ballot Measure Committees (State/local)**

- May accept unlimited contributions from individuals and corporations

# State and Local Campaign Finance Laws

- Contributions from a nonprofit corporation may be permitted by state or local law
  - May be unlimited
  - May be subject to monetary limit per election, per election cycle
  - Limits may vary by office
- State or local political committees may be required before engaging in activity
- No limits on amount that may be spent on independent expenditures at the state or local level (though registration and reporting may be required)
- May be able to use federal PACs to make contributions or independent expenditures in state or local races
- Donor disclosure at the state/local level is an emerging trend; focus on “dark money”
  - Examples: CA, NY, NJ, MD

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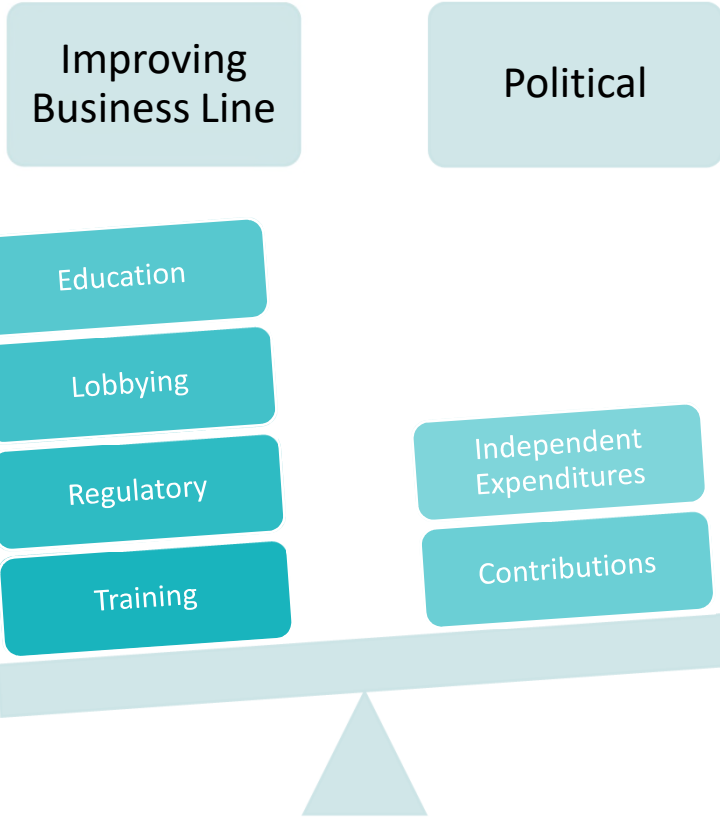
# **501(c)(4) & 501(c)(6) Election Activities**

**May Support or Oppose Candidates, Subject to Limits, Registration,  
and Reporting Requirements**

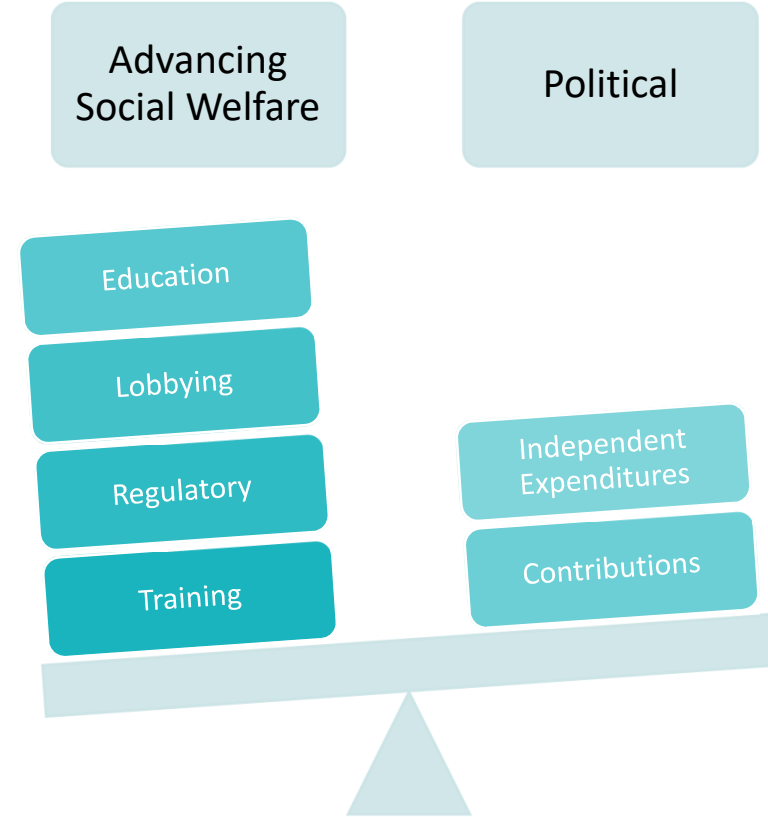
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# Tax Law: Primary Purpose

501(c)(6)



501(c)(4)



# Additional Tax Law Considerations

## Reporting

- Political expenditures and activities must be reported to the IRS on annual Form 990 information return
- Form 1120-POL must be filed with the IRS to report tax liability under Code Section 527(f)

## 527(f) Tax

- Expenditures on political activities are taxable under section Code Section 527(f) (unless paid for from a segregated fund registered as political organization with state, FEC, or IRS)
- Tax is 21%, paid on lesser of net investment income or political expenditures

## Dues Nondeductibility

- Expenditures on political activities are non-deductible under Code Section 162(e)
- Association must include political activities expenditures with “lobbying expenses” in annual calculation and reporting of percentage of dues that are non-deductible by members (unless 527(f) tax paid)

# Political Activities Options

- Issue Advocacy
- Supporting or Opposing Candidates
  - Contributions
  - Independent expenditures
  - Membership communications
  - Sponsor/support political committees
    - Corporate PACs (separate segregated fund or SSF)
    - Super PACs



# Contributions

- Federal
  - Corporate contributions prohibited
  - Must form a separate segregated fund (SSF or PAC) to make contributions
- State/local
  - Corporate contributions allowed in some jurisdictions, prohibited in others
  - May need to form a state or local PAC
  - May be able to use federal PAC to make contributions in some jurisdictions

# Independent Expenditures

- Federal, state, and local:
  - No limits on amount that can be spent by individuals or groups (including nonprofit corporations) on IEs
  - IEs may trigger reporting and/or political committee registration requirements, including donor disclosure
- 501(c)(4) or (c)(6) may form or work with a separate super PAC to make IEs
  - May contribute from 501(c)(4) or (c)(6) general treasury
    - But beware contributions in name of another
  - May fundraise directly into super PAC
  - Must account for and report value of goods or services provided to the super PAC as in-kind contributions

# Federal Membership Communications

- Membership organizations may communicate on any subject to the organization's "restricted class," including to expressly advocate the election or defeat of a clearly identified federal candidate or to solicit contributions for federal candidates
  - Not considered contributions or expenditures under FECA, and so may be paid for using general treasury funds
  - May be coordinated with candidates or political parties
  - BUT may not republish or reproduce candidate's campaign materials
- Costs of membership communications that include express advocacy must be reported on FEC Form 7
  - Due quarterly in election years beginning with the first reporting period. The aggregate costs for all candidates running in the same election exceed \$2,000

# Corporate PACs

- Corporations **may not** give contributions to federal candidates
- Corporations **may** solicit and collect contributions into an SSF from certain individuals affiliated with the corporation, which can then be used to make contributions to federal candidates
- The SSF is a bank account controlled by the corporate sponsor, not a separate legal entity
  - NO corporate funds may be deposited in the SSF account
  - But a connected corporation may use its general treasury funds to pay fundraising and administrative costs associated with the PAC (e.g., staff time, supplies, phones, direct mail, event expenses, bank fees, compliance costs, etc.) and these costs are NOT reported to the FEC

# Corporate PAC Contribution Limits

Voluntary Individual  
Contributions

\$5,000 per year



Contributions to  
Candidates

\$5,000 per election

## Corporate PAC Solicitations

- A corporate PAC may only **solicit** the corporation's "restricted class" for PAC contributions
- The restricted class depends on the type of organization involved:
  - Corporation (no members)
  - Membership organization
    - w/ Individual members
    - w/ Corporate members

# Fundraiser for Candidate—Members Only

- Limited to corporation's restricted class
  - Those non-member employees necessary for event are also OK to attend
  - Special guests (e.g., speakers) are also OK to attend
- Corporation may:
  - Urge attendees to vote for candidate
  - Solicit contributions for candidate
  - Pay for food, beverage, and other event expenses from general treasury funds
- Corporation **may not collect contributions**—all contributions must be given directly to candidate representatives
- Costs will be reported on FEC Form 7 when aggregate costs for express advocacy membership communications related to all candidates running in the same election exceed \$2,000

# Fundraiser for Candidate—General Public

## PAC Pays

- PAC invites attendees
  - Corporation members
  - Members of general public
- PAC pays for event expenses (food, beverage, room rental)
- PAC pays **in advance** for corporate staff time or other corporate resources used to plan and host event
- All is treated as in-kind contribution to candidate subject to PAC's \$5,000 limit per election

## Candidate Pays

- PAC or candidate invites attendees
  - Corporation members
  - Members of general public
- Candidate pays for event expenses (food, beverage, room rental)
- Candidate or PAC pays **in advance** for corporate staff time or other corporate resources used to plan and host event
- Anything paid by PAC is treated as in-kind contribution to candidate subject to \$5,000 limit per election



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# 501(c)(3) Election Activities

Educate & Advocate on Issues: Don't Support or Oppose Candidates

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# 501(c)(3) Election Activity Must Be Nonpartisan and Unbiased with Respect to Candidates

- Activity to support or oppose the election of a candidate for public office could result in loss of 501(c)(3) tax-exempt status
- BUT the following electoral activities are allowed if conducted within IRS guidelines:
  - Get-out-the-vote and voter registration drives
  - Legislative voting records (but beware of issuing during campaign season)
  - Candidate questionnaires and voter guides (inclusive, fair and impartial forum, broad range of issues covered)
  - Candidate debates and forums (inclusive, fair and impartial forum, broad range of issues covered)
  - Educating candidates
  - Personal political activities by nonprofit employees

# Voter Registration and GOTV

- Must be nonpartisan
- No mention of candidates, or include all candidates
- May not target voters of a particular party

# Legislative Scorecards

- Regular activity
  - Not timed with election
  - End of each legislative session
- Track a variety of issues
- Include all legislators
  - Don't include candidates who are not incumbents
  - Don't mention which incumbents are candidates
- Avoid editorializing

# Voter Guides and Candidate Questionnaires

## Approach

- All candidates for office sent questionnaire
- Unbiased structure
- No endorsement
- No pledge of support
- No grading responses (+/-)

## Questions

- Clear and unbiased
- Subjects cover major areas of interest
- Clear issue descriptions
- Don't ask to accept a pledge

## Answers

- Reasonable time to respond
- If limited answers allowed (support/oppose), opportunity to explain position
- Don't edit responses

## Format

- Questions the same in the guide as provided to candidates
- Answers the same as provided or edited for space only
- Answers presented close to the question

# Candidate Appearances—Unrelated to Candidacy

- Appearances unrelated to candidacy are permissible
  - e.g., Incumbent official, expert, community leader
- No mention should be made of the election or candidacy before or during the event by the candidate or sponsoring organization
  - Invitations and introductions should refer to official/non-candidate role only
  - Notify speakers in advance of ground rules
  - Consider disclaimers at event (written materials, announcement)
- Do not work with campaign staff to organize
- Do not allow political fundraising

# Candidate Forums and Debates

- Consider FEC rules before proceeding!
- Do not indicate support for or opposition to any candidate (explicitly or through biased presentation of topics or questions)
  - Provide equal opportunity to respond/present views
  - Don't use agree/disagree questions
  - Don't comment on responses
- Questions should cover breadth of issues of interest to electorate
- Provide equal appearance opportunity to all candidates seeking the same office
  - Same or comparable event
  - Invitation need not be accepted
- Do not allow political fundraising
- Maintain neutral atmosphere

# Candidate Debates

- All candidates invited
  - May use objective criteria to create reasonable size
  - May host for one party for primary elections
- Questions must be neutral
  - Variety of topics
  - May not favor one candidate
- No endorsements



# Educating Candidates

May urge candidates to support policies (“lobbying” candidates)

May not ask candidates to take a pledge

May provide policy papers and other materials (preferably available to the public)

Should provide material to all candidates

Should not create content at the request of candidates, unless it will be shared by all

# Praising or Criticizing Incumbents in Election Year

## Do

- Focus only on official actions (votes; bills introduced)
- Time communications to coincide with policy actions (specific vote; administrative hearing; bill introduction)
  - Include legislative calls to action (“contact Sen. Smith”)
- Use nonpartisan criteria to choose the incumbents featured and the audience

## Avoid

- Referring to the election, voting, or removing someone from office
- Criticizing personal character
- Commenting on incumbents for whom your issue is a defining campaign issue or point of contention among the candidates or comparing opponents

# Employee Political Activity

- 501(c)(3) executives do not lose right to engage in personal political activities
- BUT:
  - Must act in personal capacity
  - Must not use 501(c)(3) resources
  - May use job title and affiliation for identification purposes only (e.g., on an op-ed)
    - Include disclaimers
      - “Titles for identification purposes only.”
      - “Sally Smith is the Executive Director of Neighborhood 501(c)(3). The views presented here are the personal views of Sally Smith, and are not presented on behalf of Neighborhood 501(c)(3).”

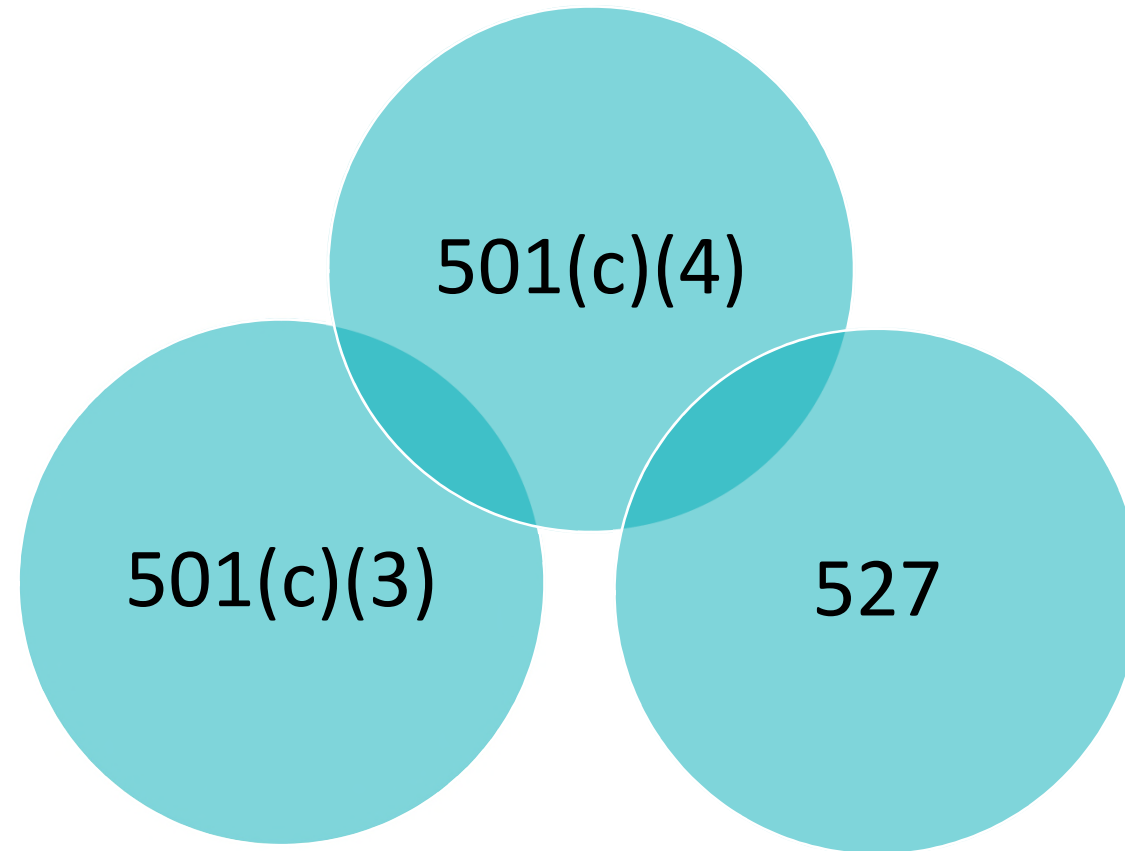
# Employee Political Activity

- Consider establishing a policy governing political activities for leaders and staff:
  - No political statements on behalf of the organization
    - Official functions
    - Official newsletters, website, or social media
    - Letterhead
  - No use of the organization’s facilities or resources for personal political activities
    - No political activities on work time
    - Computers, telephones, photocopiers, staff support, etc.
  - Other policies depend on mission and culture
- Ability to regulate off-duty activity is governed largely by state employment laws, which vary



# Affiliated Tax-Exempt Entities

# Achieving Advocacy Goals with Affiliated Entities



# Examples

- 501(c)(3) organization considering increased lobbying activity and political activity
  - Consider forming 501(c)(4) organization to house lobbying campaigns and to engage in some political campaign activity, including potentially direct contributions at state/local level
  - Consider forming new 501(c)(4) organizations to participate in state ballot initiative campaigns as ballot committees
- 501(c)(4)/(c)(6) organization considering federal or state independent expenditures to support or oppose candidates
  - Consider forming new 527 organization registered as state independent expenditure-only committee to address donor disclosure or other branding concerns
- 501(c)(4)/(c)(6) organization considering how to make contributions to federal candidates
  - Consider forming traditional federal PAC (a “separate segregated fund” tax-exempt under IRC section 527)

# Managing Affiliated Entities: Compliance Tips

- Maintaining separateness between affiliates is critical
  - Separate organizing documents, separate minutes, separate accounts, separate finances
  - Consider degree of overlap in board and managerial control
  - Shared employees ok; need cost-sharing agreement
  - Arm’s-length transactions
  - Branding and public perception of the two organizations
  - Separate funding sources
    - (c)(3)s may make grants to (c)(4)s and (c)(6)s, but funds must be used only for charitable purposes (not for political activities)
  - Risk is that 501(c)(4)/(c)(6)’s political activities are imputed to 501(c)(3), causing 501(c)(3) to lose recognition of exempt status



# Managing Affiliated Entities: Compliance Tips

- Timekeeping and expense tracking important
  - For any cost-sharing agreement
  - For campaign finance reporting purposes (in-kinds)
  - Ensure appropriate entity is registering and reporting
- Form 990 reporting-relationships with affiliated entities reported on Schedule R



**Questions?**

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# 2020: Navigating International Trade Trends and Their Impact on Your Global Nonprofit Operations

February 20, 2020 12:30pm-1:30pm



**Cindy M. Lewin**

Partner, Venable LLP | +1 202.344.4273 | [CMLEwin@Venable.com](mailto:CMLEwin@Venable.com)

**Lindsay B. Meyer**

Partner, Venable LLP | +1 202.344.4829 | [LBMeyer@Venable.com](mailto:LBMeyer@Venable.com)

**VENABLE** LLP